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PRINCIPLES OF THE
CONSTITUTIONAL LAW
OF THE
UNITED STATES

BY

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PREFACE

This volume is an abridgment of the author's larger work, the second edition of which was published in 1929 in three volumes under the title *The Constitutional Law of the United States.* The aim has been to present the general principles of American constitutional jurisprudence in a form suitable for class-room use. In pursuance of this aim care has been taken to cite those cases which not only support the propositions of the text but which will best repay individual examination and study by the student. In particular, the effort has been made not only to state the well settled doctrines of Federal jurisprudence, but to suggest, and in a measure to discuss, the questions of a constitutional character which cannot be said to be as yet fully determined. The necessary limits of space have prevented in many instances a full presentation of the arguments supporting the doctrines stated, but, from a pedagogic point of view, this may perhaps be a merit rather than a defect, since thus is furnished opportunity for a presentation by the students of the Supreme Court's reasoning as gained by a reading of the cases and criticism by the instructor of the reasoning as thus presented.

For many valuable suggestions and criticisms, the author is deeply indebted to Professor Robert D. Petty, Dean of the New York Law School.

For the preparation of the Table of Cases, the author is under obligation to one of his students, Mr. Leon Sachs.

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CONSTITUTION OF THE UNITED STATES[1]

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. 1 The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2 No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3 Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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[1] This reprint of the Constitution exactly follows the text of that in the Department of State at Washington, save in the spelling of a few words, capitalization, and the addition of numerals to the clauses of the sections.

[2] Superseded by the 14th Amendment.

4 When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5 The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1 The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof,[3] for six years; and each senator shall have one vote.

2 Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3 No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4 The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5 The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6 The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7 Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1 The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

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[3] Changed by 17th Amendment.

2 The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1 Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2 Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3 Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4 Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1 The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

2 No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

SECTION 7. 1 All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2 Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the

objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return in which case it shall not be a law.

3 Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1 The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2 To borrow money on the credit of the United States;

3 To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4 To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5 To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6 To provide for the punishment of counterfeiting the securities and current coin of the United States;

7 To establish post offices and post roads;

8 To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9 To constitute tribunals inferior to the Supreme Court;

10 To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11 To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12 To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13 To provide and maintain a navy;

14 To make rules for the government and regulation of the land and naval forces;

15 To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16 To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17 To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18 To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1 The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2 The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3 No bill of attainder or *ex post facto* law shall be passed.

4 No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5 No tax or duty shall be laid on articles exported from any State.

6 No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

7 No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8 No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1 No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2 No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3 No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. 1 The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows

2 Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[3a]

3 The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4 No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5 In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6 The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7 Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1 The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2 He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent

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[3a] Superseded by the 12th Amendment.

of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3 The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. 1 The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States,—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2 In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall

have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3 The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1 Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2 The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1 The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2 A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3 No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1 New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2 The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so con-

strued as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1 All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2 This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3 The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENTS

ARTICLE I[4]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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[4] The first ten Amendments were adopted in 1791.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[5]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[6]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

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[5] Adopted, 1798.

[6] Adopted, 1804.

ARTICLE XIII[7]

Section 1. Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[8]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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[7] Adopted, 1865.

[8] Adopted, 1868.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV [9]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI [10]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

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[9] Adopted, 1870.

[10] Adopted, 1913.

ARTICLE XVII [11]

1 The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

2 When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

3 This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [12]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX [13]

1 The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

2 Congress shall have power by appropriate legislation to enforce the provisions of this Article.

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[11] Adopted, 1913.

[12] Adopted, 1919.

[13] Adopted, 1920.

PRINCIPLES OF THE CONSTITUTIONAL LAWS OF THE UNITED STATES

CHAPTER I

INTRODUCTORY—THE ADOPTION OF THE CONSTITUTION

The thirteen American colonies which fringed the Atlantic coast of North America declared, on July 4, 1776, their political independence from their mother country, Great Britain, and, as a result of the Revolutionary War which followed, gained the recognition of that independence by Great Britain by the treaty concluded in 1782 and proclaimed in 1783. By Article I of this treaty His Britannic Majesty acknowledged "the said United States, viz. New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States."

Previous to this, the colonies, terming themselves States, had, for the prosecution of the war and for the ordering of their common domestic affairs, acted through certain common political organs or instrumentalities, such as the First and Second Continental Congresses, and had, each of them, made provision for their several governments by adopting written constitutions.[1] In 1781 they had taken the further step of grouping themselves into a Confederation under an agreement termed "Articles of Confederation."

These Articles, while leaving the States legally sovereign and independent of each other, made provision for common action in a number of important respects, and provided a single representative body, termed a Congress, through which this common action could be taken. By Article I of this instrument the Confederacy was styled "The United States of America": and, by Article III the purpose of the Confederacy was declared to be the establishing of "a firm league of friendship with each other, for their common defence, the securities of their liberties, and their mutual and general welfare."

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[1] For the most part these constitutions were adaptations of their previous colonial charters.

Space cannot be spared for a full description of the articles of this instrument of government, but, in general, it may be said that such powers as were specifically delegated by the States to the Confederacy were vested in a Congress consisting of a single chamber, the members of which were appointed by the States in such manner as each of them might desire. Voting in the Congress was by States. Each State was entitled to not less than two nor more than seven delegates, the votes of a majority of whom decided the vote of the State. A "Committee of States," consisting of one delegate from each State, was empowered to act when the Congress was not in session.

The chief defects in this scheme for united action, which made themselves almost immediately manifest, were the following:

1. There was no strong executive organ.
2. There was no organized national judiciary.
3. Such orders as the Congress or Committee of States was authorized to issue were directed not to the individual citizens of the several States but to the governments of those States, and no adequate means or modes for compelling obedience to these orders were provided.
4. The several States were obligated to act, or to refrain from acting, in various matters, but, here again, no adequate legal means were provided for compelling obedience to these provisions, and, in fact, they were constantly violated.
5. The central government had no power itself to obtain the revenues needed by it. In this respect it was dependent upon requisitions made upon the States, which the States might, and did, ignore. The same was true as to raising and maintaining such military and naval forces as the Confederacy might need.
6. There was no power in the Confederacy to compel obedience upon the part of the States to treaties entered into by the United States, and, in fact, they were not, in all cases, obeyed. Foreign States recognized this weakness and refused to enter into further treaties with the United States. Washington said: "We are one nation today, and thirteen tomorrow. Who will treat with us on such terms?"
7. Provision was made for dealing with disputes between the States, which were many, but not for their final judicial settlement.
8. Even such action as the Congress or Committee of States was empowered to take was, with respect to the more important matters, made almost impossible by reason of the provision that an approving vote of nine of the States was made necessary.
9. Only powers "expressly" granted could be exercised by the Congress.
10. Finally, changes in the Articles of Confederation were made prac-

tically impossible by the requirement that they could be sanctioned only by a unanimous vote of the States.[2]

Important among the powers lacked by the central government under the Articles of Confederation was that relating to the control of commerce among the thirteen States and with foreign States. Made desperate by the evils resulting from the disputes between, and the discriminating actions taken by, the various States with regard to this commerce, a meeting at Annapolis, Maryland, of delegates from the States to see what could be done to improve the situation was called. However, when convened, but five States were found to have sent delegates. The Annapolis Convention thus was unable to effect the purpose for which it had been convened, but, by the report which it prepared, it did something still more important—it recommended that a new convention be convened "to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every State, will effectually provide for the same."

As a direct result of this recommendation a call was issued by the Congress of the Confederation for the assembling of a convention "for the sole and express purpose of revising the Articles of Confederation," and this convention, which has subsequently been known as the "Constitutional Convention," did meet in Philadelphia in May, 1787, all the States except Rhode Island being represented therein.

This Convention went far beyond its "terms of reference" and not only drafted an entirely new Constitution, instead of merely revising the Articles of Confederation, but made its adoption depend upon its acceptance by at least nine of the thirteen States acting through conventions to be specially convened for the purpose in each of the States,—a mode which differed radically from that provided by the Articles for its own amendment.

The Constitutional Convention, sitting in secret session, under the presidency of Washington, had many difficulties to meet in its efforts to satisfy State jealousies while yet providing for a national government with adequate powers, but completed its labors on September 17, 1787, when the engrossed Constitution was read and signed.[3]

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[2] For a discussion of the defects of the Articles of Confederation by Alexander Hamilton, see Nos. 15 and 21 of *The Federalist*.

In his article entitled "The Federal Constitution and the Defects of the Confederation" in II *American Political Science Review*, 532–544, Professor Max Farrand gives an extended list of the defects of the Confederation, with suggested remedies compiled from the writings of persons who later became members of the Constitutional Convention of 1787 which framed the present Constitution of the United States.

The Constitution then went to the Conventions in the States for ratification, and not until June, 1788, was the approval of the ninth State secured. The old Congress fixed upon the first Wednesday in January, 1789, for the election of members of the Congress provided for by the new Constitution, and for the election of the electors who were to elect the new President; the first Wednesday in February for the meeting of these electors and the election by them of the President (George Washington was their unanimous selection); and the first Wednesday in March—which fell upon the fourth day of the month—for the inauguration of the new government.[4]

As will later appear, the debates in the Constitutional Convention, as well as those in the State ratifying Conventions,[5] have very considerable interpretative value with regard to the meaning to be given to provisions of the Constitutions which are not wholly explicit; and, to a scarcely less degree the same is true of the papers by Hamilton, Madison, and Jay, collectively known as *The Federalist*, in which the provisions of the Constitution were explained and sought to be justified at the time the adoption of that instrument by the State Conventions was pending.

The all important distinction between the Union created by the Articles of Confederation, and that provided for by the new Constitution was that, whereas the Articles provided merely for a league or association of States which remained severally sovereign, the Constitution created a genuine National State, with a sovereignty of its own, and a complete governmental machinery through which that sovereignty might be exercised and brought to bear not only upon the States but directly upon their citizens. In what sense, if any, the States could be said to have retained, under the Constitution, any sovereignty of their own, long remained a matter of controversy, and one for the final settlement of which a four years' Civil War was required. The juristic significance of this controversy will be dealt with in general terms in the immediately following chapters, but its various implications have appeared throughout the history of the United States since 1789, and continue even to the present day to play a part in the constitutional decisions of American courts.

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[3] Three members, Randolph, Mason, and Gerry declined to sign.

[4] Owing to a delay in the assembling of the new Congress, Washington was not, in fact, inaugurated, and the new government established until April 20, 1789. However, legally speaking, the new government has always been deemed to date from March 4th.

[5] These, so far as records of them were kept, were later brought together and published in 1830 by one Jonathan Elliott, and have since been referred to as *Elliott's Debates*.

The principal source of information which we have of the debates and proceeding in the Federal Constitutional Convention are the notes taken at the time by James Madison. The manuscript of these notes, included in what are known as the *Madison Papers*, had been purchased by Congress and were not published until 1840. Before this, in 1818, Congress had authorized the publication of the formal "Journal of the Convention" which had been kept by its Secretary, William Jackson.

Under the title *The Records of the Convention*, Professor Max Farrand has collected, edited and published (1911) in three volumes all available and authentic material dealing with the proceedings and debates of the Constitutional Convention, including the texts of the various plans submitted by individual members to that body. The volumes are well indexed and thus constitute the most ready means we have of referring to the work of the Convention.

CHAPTER II

PRELIMINARY DEFINITIONS

The constitutional jurisprudence of the United States is an especially complicated one, and its principles proportionately difficult of exposition and comprehension. This complexity is in the main due to the Federal character of our governmental system. A prerequisite to an accurate understanding of American public law is, therefore, a knowledge of the juristic nature of the Federal form of political organization, and this, in turn, necessitates an explanation of certain terms such as "State," "Government," "Sovereignty," and "Constitutional Law." The definition of this last term will be found expecially necessary in order that its American usage may be distinguished from that of other countries of the world.

§ 1. State and Government Distinguished.

An aggregate of individuals living together and united by mutual social and economic interests is termed a Society. A Society viewed as a politically organized group is termed a Body-Politic or State. The complexus of organs or agencies through which the State performs its functions are termed its Government. The persons who operate this political machinery are collectively known as its Magistracy. The commands and directions issued by the State and enforced through its government by those in official authority are known as Laws. These laws are divisible into public and private, the former including, as sub-classes, constitutional and international law. Political theorists and jurists are not agreed as to whether, strictly speaking, the rules regulating the relations of States to one another should be termed laws. This, however, is a question which it is not necessary here to discuss.

Constitutionally viewed, the State appears as an entity or corporate person possessing the supreme legal will, or, as this supreme legal will is termed, the Sovereignty. The State is thus the ultimate source of law for all persons subject to its authority. These persons include all those who owe direct fealty or allegiance to the State, and known as citizens or subjects, as well as all citizens or subjects of other States, known as aliens, who are temporarily or permanently within the territorial limits of the State.

In every politically organized community entitled to be termed a State there exists, then, an authority to which, from the legal point of view, all interests are potentially subject. In the entire body of laws, public and private, as they exist at any one time, is stated the supreme will of the State so far as it has found expression. Because supreme, and the sole source of law, the only legal limits to this will are those which are self-set. These self-set limitations exist in the form of constitutional provisions determining the manner in which the State's sovereign will shall be expressed and enforced. In other words, these constitutional or fundamental provisions provide for the governmental organization of the State, and delimit its powers. The Government, therefore, as distinguished from the State, exercises the sovereignty, but does not possess it. Instead of being itself the ultimate source of legal authority, its agents may legally exercise only those powers recognized by existing constitutional law. Where, as in a State autocratically organized, few or no legal limitations upon the official authority of the autocrat or of his appointees and advisers exist, the government has, of course, practically uncontrolled legal power. In modern constitutional States, however, the governments are not only without legal authority with reference to many matters, but are obliged to exercise the authority which they do possess according to definitely determined modes of procedure. It is to be repeated, however, that the domain of the legal and political interests of the individual is simply that which, under existing laws, neither public nor private persons may legally enter. From the possible control of the State, however, through the enactment of new constitutional or statutory laws these liberties are not and cannot be exempt. Professor Burgess has put this very clearly when he says: "The individual is defended in this sphere against the government by the power that makes and maintains and can destroy the government; and by the same power, through the government, against any encroachments from any quarter. Against that power itself, however, he has no defence." [1]

This characteristic of legal omnipotence thus predicated of the State is, of course, not to be construed as carrying with it an actual omnipotence of physical coercive power. The extent to which any given State, or, to speak more accurately, those who express and enforce its will, may control the actions of those subject to their authority is dependent upon manifold conditions of time and place, and especially upon the character and disposition of those to be coerced. All government, as Hume says, rests upon opinion. In every State the very existence of its government, the extent of its powers, and the manner of their exercise, is ultimately dependent upon the acquiescence of the people. This ultimate right of the people means, however, nothing more than that there is a limit to which political oppression and incompetence may safely go. Before this limit is reached—a limit which differs in different States according to the temper and enlightment of their respective citizen bodies—there is abundant opportunity for grievous oppression and disastrous official incompetence. The fundamental problem of practical politics the world over is thus to secure a form of political organization which will ensure a wise administration of public affairs, and be sufficiently strong and independent to maintain itself against unwarranted attack, and yet be subjected to a control which will furnish a substantial guarantee that the people will not be oppressed. This is the problem of constitutional government, and of constitutional law.

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[1] *Political Science and Comparative Constitutional Law*, I, p. 176.

§ 2. The Unity and Indivisibility of Sovereignty.

In the paragraphs which have gone before it has been indicated that, legally viewed, the essential characteristic of a State is the possession by it of a supreme law-determining authority termed Sovereignty. This attribute connotes upon the one hand complete freedom of its possessor from the legal control of any other political authority whatsoever; and, upon the other hand, the right of absolute and exclusive jurisdiction over the legal rights and obligations of those subject to its authority, whether these be considered individually or as grouped into larger or smaller associations of men.

As thus expressing a supreme will sovereignty is necessarily a unity and indivisible. That there cannot be within the same political body two wills, each absolutely supreme, would seem to be sufficiently obvious, and, in fact, the contrary has not often been maintained in direct terms. It has, however, been widely asserted that the sphere of political authority may be divided into two or more distinct parts, and political organizations established in each which, within their respective fields, may be wholly independent of the control of one another. And this has been, and still often is, spoken of by the Supreme Court of the United States, as well as by other tribunals, as a division of sovereignty and as exemplified in the American constitutional system. The statement is, however, an erroneous one, and due to a confusion between the ideas of State and Government, and to a failure to distinguish between the possession of sovereignty by the State and the exercise by governmental agencies of powers delegated to them by this sovereign authority.

Though the sovereign will of a State may not be divided, it may find expression through several legislative mouthpieces, and the execution of its commands may be delegated to a variety of governmental agencies. Theoretically, indeed, a State may go to any extent in the delegation of the exercise of its powers, not only to governmental organs of its own creation but to those of other States. In the latter case the State to whose governmental organs the exercise of the powers in question has been delegated acts as the agent of the delegating State, which State retains the legal, if not the actual, power of withdrawing the grants of authority which it has made. In the numerous so-called Protectorates we have instances of weaker and less developed States surrendering the control of their foreign relations and, indeed, of certain of their domestic affairs to foreign nations, without any formal claim of sovereignty over these administered districts or weaker States being asserted by the administering powers.

§ 3. Constitutional Law.

In the broadest sense of the term, every politically organized society possesses a Constitution. By this is meant that it possesses a body of rules or principles which determine the form of government which shall exist, and allot to its various departments or officials their respective powers. When these rules are fairly definite, are recognized by those in authority as controlling, and are supported by a public opinion sufficient in force to offer a considerable guarantee that they will be obeyed, the State is said to have a constitutional government. Thus, if the political rule is monarchical in character, the government is said to be a constitutional monarchy. But, in an exact sense of the term, every politically organized society may be said to possess a Constitution, written or unwritten.

In order that the rules that regulate the distribution and exercise of political authority may be better and more exactly known, they are, in most modern States, reduced to definite written statement; and in order that, as thus stated, they may have an additional binding force, they are usually drafted and adopted in some especially formal and solemn manner, and, in most cases, special provision is made as to the manner in which they may be revised or additions made to them. Usually this method of revision and amendment is made considerably more difficult than is the enactment of ordinary legislative measures.

Among the modern great nations Great Britain stands alone as a State without a formal written instrument of government. She has, however, a government controlled by a definite body of constitutional rules and practices, many of these being embodied in important written documents, such as the Magna Charta, the Bill of Rights, the Habeas Corpus Act, etc., but, however politically sacrosanct these principles thus definitely stated, and however controlling in practice the great body of her written public law, the essential characteristic of England's constitutional system is that she is ruled by a legally omnipotent Parliament which has the legislative power to change, by ordinary statutory enactment, any or every feature and rule of her governmental organization. In this last respect it is to be observed, however, that, legally speaking, Great Britain does not in fact stand upon a different footing from those States which have adopted written instruments of government the amendment or final interpretation of which is within the control of the legislative branch.

The adoption of written Constitutions does not prevent the existence and development of bodies of unwritten constitutional law; for, however comprehensive these fundamental documents may be, there inevitably grows up a considerable body of unwritten constitutional practices as fixed and, for all practical purposes, as obligatory as those provided for in the written instruments. Furthermore, in any event, a written Constitution requires interpretation, and when the power of interpretation is confided to the courts there necessarily develops in the decisions which are rendered a constantly increasing body of rules and principles which in the aggregate compose the constitutional law of the country. Thus, in the United States, in the nearly three hundred volumes of the decisions of the Federal Supreme Court, not to speak of the reported opinions of the State and lower Federal courts, a complex system of constitutional jurisprudence has developed which requires the preparation of lengthy and elaborate commentaries for its statement and explanation.

From what has been said it is seen that if we are to seek a definition of constitutional law, valid for all countries, and which will distinguish it from other classes of law, we cannot accept as its peculiar characteristic the fact that it is found embodied in written and formally adopted and promulgated documents denominated Constitutions. Nor can we select as its distinguishing mark the fact that it is of superior legal validity. For, not to speak of England, which, according to such a description, could not be said to have any constitutional law at all, we are met by the fact that in few countries other than our own is this legal superiority of constitutional law fully recognized. For a general definition of constitutional law we are thus thrown back upon its subject-matter, and are obliged to content ourselves with the description with which we started, namely, that it embraces all those rules and principles which determine the form of governmental organization of a State, and allot to its several organs or departments their respective powers.

This, for the purpose of general political theory, is a correct definition of constitutional law. But it is not a definition which is adequate for a nation, such as the United States, living under written Constitutions which give to the courts their final interpretation, and which obligates them, in cases of conflict between these written constitutional provisions and ordinary statutory laws, to give precedence to the former. Under this system constitutional law must be said to embrace all law that, irrespective of its substance, is contained within the four corners of written instruments of government denominated Constitutions. Were these constitutions wholly devoted to the creation of governmental machinery and the allotment of powers to its constituent parts, the law embraced within this formal definition would substantially coincide with that included within the definition stated above as satisfactory to the political theorist. But, in fact, many of our State Constitutions go far beyond this and include provisions which, viewed with regard to the matters to which they relate, properly belong within the field of private statutory law.

The Federal Constitution has of course a double function to perform. It has not only to provide for a governmental machinery for the Union, and to distribute its powers, but to delimit the respective competencies of the Nation and of the individual States. Regarded as an instrument for this second purpose it is a grant of power giving to the United States those powers which it is to possess, and leaving with the States, with but a few enumerated exceptions, those powers which are not so granted. The State Constitutions are, upon the contrary, primarily instruments of limitation. In so far as they are not devoted to providing machineries of government, they have for their end and aim the placing of limitations upon the governments which they create, which governments are held to possess all powers not denied to them by the Federal Constitution or specifically withdrawn from them by the respective Constitutions to which they owe their origin. These State constitutional limitations are for the most part upon the legislatures, and the increase in their number which the more recently adopted Constitutions have shown has evinced a growing distrust upon the part of the people of their legislative representatives. The distrust has also been shown in some instances by the insertion of provisions for the referendum and the popular initiation of laws. But not a few of these added constitutional clauses have been due to a distrust of the courts, the aim being so explicitly to authorize legislation as to render it practically impossible for the courts to interpose the objection of unconstitutionality as tested by the State Constitutions.[2]

§ 4. The American Doctrine of the Supremacy of the Constitution.

It has already been indicated that in the United States the courts are the final interpreters of the constitutional powers not only of executive and administrative officers but of the legislatures themselves. Independently of express statement to this effect in the Constitution it has become an established principle that no statute is valid if inconsistent with the provisions of the Constitution from which the enacting legislature derives its powers. So, similarly, no act or order of an executive official is legal for the performance or issuance of which a constitutional authorization cannot be shown. A State statute inconsistent with the Constitution of that State is, therefore, invalid, and an act of Congress not warranted by the provisions of the Federal Constitution is similarly void. In addition to being subordinate to the provisions of the State Constitution, every act of a State official or organ must conform to the requirements of the Federal Constitution, and this applies as well to the provisions of the Constitution of the State as to the statutes of its legislature.

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[2] This, however, still leaves it possible for the State courts to hold State statutes void upon the ground that they are in conflict with the Federal Constitution, and especially with that clause of the Fourteenth Amendment which declares that no "State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This principle that statutory law, in order to be valid, must be in conformity with constitutional requirements is a product of American jurisprudence. In this country the written constitutional law not only morally, but legally restrictive of the law-making branch of the government, and the final interpretation of these restrictions, express and implied, is vested in the judicial department.[3]

The general principle is that a law held void, because unconstitutional, is as though it had never been. It is declared never to have been a law, and hence that no legal rights can be claimed under it. If, however, by a later decision, the court reverses its former opinion, and upholds the law, it is considered as having been in force and valid from the time of its enactment. In practice, as a matter of justice and of expediency, these principles have at times been departed from, but in general the rule is as stated.[4]

The expediency of giving this power to the courts is, of course, open to discussion. That it is a tremendous power cannot be questioned. As said by Bishop Hoadly years before our Constitution was adopted, "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them." It would seem clear that by training, by tenure of office, and by the character of the functions which they perform, the judges of the Federal Supreme Court and of the highest courts of the States are less likely to be hurried on, under the pressure of passion, or of temporary exigency, to such a violation of the spirit, or to such a strained construction of the language, of the Constitution as will deprive that instrument of its true restraining character. But, upon the other hand, there is the danger, which not a few persons think has in some instances become a reality, that the judges, not being in close touch with or responsible to public opinion, will assume an unnecessarily strict or biased attitude towards the constitutional powers of the legislature, and especially towards those relating to what is known as the police powers of the State. In general, however, it is to be said that the courts, have, by the rules which they have laid down for themselves with reference to the validity of legislative acts, kept their authority within just and expedient limits. These rules are considered in Chapter III.

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[3] Professor A. V. Dicey in his well-known treatise, *The Law of the Constitution* (7th ed., 1908, note vii, Appendix), calls attention to the three different meanings of the phrase "unconstitutional law" as employed in England, France, and the United States. In England it means simply that, in the opinion of the person using it, the measure is opposed to the spirit of the unwritten principles of constitutional practice, but not that it is, for that reason, void of legal force. In France the term means that the act is contrary to the provisions of the written Constitution, but not that the courts will refuse to recognize its legal validity. The word "unconstitutional," says Dicey, "would probably though not of necessity be, when employed by a Frenchman, a term of censure." In the United States an unconstitutional measure is one not warranted by the written instruments of government of the States or of the United States, and, as such, is held not to be a law at all. It is an *ultra vires* measure, and at most only a vain attempt upon the part of the enacting body to create a law.

[4] Norton v. Shelby Co. (118 U. S. 425). But see Gelpcke v. Dubuque (1 Wall. 175); and exceptions coming under the doctrine of *de facto* officers and corporations acting under unconstitutional statutes.

§ 5. The Courts and Unconstitutional Laws.

The principle that statutory law, in order to be recognized as valid by the courts, must, in all cases, be in conformity with constitutional requirements, is a product of American law, and, though now found in the jurisprudential systems of some other countries, has nowhere received the development and extended application that it has received in the United States.[5] That, granting the supremacy of the National Government, and the subordinate constitutional status of the member States of the Union, the laws and other acts of these States should have their validity tested by the provisions of the United States Constitution, is, of course, a very different proposition from that which holds that measures enacted by the National legislature must meet the requirements of the National Constitution, for, in the one case, we have to deal with an inferior political body *vis à vis* a superior political authority; while, in the other case, we have presented the examination by the courts of the validity of the acts of a legislative body which derives its powers from the same constitutional source as do the courts themselves. Thus, when it is held that the enactments of the legislatures of the member States of the Union are of no legal force and effect, if not warranted by the provisions of the United States Constitution, there is applied a principle that is recognized and applied in the private as well as the public law of all constitutionally administered States, namely, that, to be valid, an agent must act within the authority granted him by his principal. Hence, when a law of a State of the American Union, whether embodied in an enactment of its legislature, or in the Articles of its written Constitution, is held void because not warranted by the United States Constitution, the rule applied is exactly similar to that which controls the courts of other countries when they have to deal with the acts of colonial or administrative bodies which have only those legislative or other ordinance-making powers which the sovereign authority has granted to them. In short, what controversy there has been in the United States as to the validity of laws of the individual States, as tested by the United States Constitution, has related solely to the constitutional status and powers of the individual States. No one has attempted to deny, that, if these States be viewed, as they now are universally viewed, as subordinate and non-sovereign bodies, their acts are without legal force in so far as they are not warranted by the provisions of the National Constitution.

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[5] As to unconstitutional law under the new German constitution, see *American Political Science Review*, vol. XXI, p. 113, "Judicial Review of Legislative Acts in Germany," by F. F. Blachly. As to Canada, see the article by Professor Charles G. Haines, "Judicial Review of Legislation in Canada" in the *Harvard Law Review*, April, 1915. As to the power of judicial review in other foreign countries, see the address by the same author, "A Government of Law or a Government of Men: Judicial or Legislative Supremacy," delivered before the University of California at Los Angeles (published in 1929 by the University).

When a State law is held void because not authorized by the Constitution of that State there is, of course, applied the same principle that is employed when an act of Congress is refused recognition by the courts because inconsistent with the United States Constitution. However, the courts, when judging as to the extent of the constitutional powers of a State legislature, are guided by a more liberal principle than is applied when dealing with Congress,—a practice that results from the constitutional theory that the National Government, and therefore its several departments, legislative, executive and judicial, possess only those powers which have been vested in them by the National Constitution; whereas, the States possess all powers except those which have expressly or by necessary implication been withheld from them by the National Constitution, and the further doctrine that these States, by their several written Constitutions, have vested in their several governments all the powers reserved to them by the National Constitution except in so far as, by express provision or necessary implication, it has been otherwise declared.[6]

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[6] "The distinction between the United States Constitution and our [New York] Constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature all legislative power. In the one

That acts of Congress, if in conflict with provisions of the Federal Constitution, may be held void by the courts has been an established doctrine of American constitutional jurisprudence since the decisions of the United States Supreme Court, in 1903, of the case of Marbury v. Madison.[7]

§ 6. Effect of Subsequent Grant of Legislative Power.

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid, without reënactment, if later, by constitutional amendment, the necessary legislative power is granted. "An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted."[8]

However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as, for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there

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case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised." People v. Flagg (46 N. Y. 401).

"That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question." R. R. Co. v. Otoe (16 Wall. 667).

[7] I Cr. 137. However, the reasoning of Chief Justice Marshall in the opinion which he rendered in this case is not wholly satisfactory. As to this see Willoughby, *The Constitutional Law of the United States*, 2d. ed., vol. I, §§ 3 and 4.

Some writers have claimed that the assumption by the courts of the right to declare void such acts of Congress as they deem not warranted by the Federal Constitution, was, and has continued to be a usurpation of power. The author of this volume is of opinion that there is no valid ground for such a charge. However, a considerable literature upon this subject exists. The most comprehensive discussion of it is probably Haines, *The American Doctrine of Judicial Supremacy*. For an excellent defence of the desirability as well as the legal propriety of this judicial power, see Charles Warren, *Congress, the Constitution and the Supreme Court.*

As to the constitutionality of various proposals which, at times, have been put forward to limit the power of State and Federal courts to hold invalid statutes of their respective legislatures, see Willoughby, *The Constitutional Law of the United States*, vol. I, § 25.

[8] Newberry v. United States (256 U. S. 232). Some of the State courts have declared a contrary doctrine. See 38 L. R. A. (N. S.) 77, note.

should be no regulation, the act does not need to be reënacted in order to be enforced, if this cause of its unconstitutionality is removed.[9]

Also, as will later appear, a statute, constitutional at the time of its enactment, may, because of a change of circumstances, become, in its application to those circumstances, unconstitutional. Thus a legislatively fixed railway rate, reasonable at the time, may later become so unreasonable as to be confiscatory in its effect and therefore invalid as a denial of due process of law.

§ 7. Effect of an Unconstitutional Statute.

The statement that a statute declared unconstitutional is as though it never existed, while in principle true, needs, in fact, to be somewhat qualified, since there are circumstances under which legal rights or obligations or consequences are attached to a legislative enactment which is later held to be unconstitutional. In other words, the retroactive force of the judicial pronouncement as to this unconstitutionality is not complete.[10]

In accordance with the general doctrine declared in Norton v. Shelby Co.,[11] and repeated in other cases, some State courts have held that one convicted under an unconstitutional statute is entitled to have his conviction reversed even though he pleaded guilty in the trial court, and the statute in question related only to a matter of practice or procedure and not to the substance of the offence charged against him.[12] And the United States Supreme Court has declared the same doctrine with regard to persons convicted under unconstitutional statutes either in the State courts or in the inferior Federal courts.[13]

This doctrine, however, does not necessarily cover the case of a person convicted under a law held, in his case, to have been valid, but later, in another case, held to be void. The author does not know of an exact instance in which this has occurred, but it may be that, in such a case, a person serving a term of imprisonment, or having paid a fine to the

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[9] *In re* Rahrer (140 U. S. 545); Pierce v. Pierce (46 Ind. 86); McCollum v. McConaughy (141 Ia. 172); State of Iowa v. O'Neil (147 Ia. 513).

[10] As to this see the able article of Professor O. P. Field, "Effect of an Unconstitutional Statute," in 1 *Indiana Law Journal*, p. 1. This article has served as the basis for the text of the present section. See also the able articles by the same author, "The Status of a Municipal Corporation Organized under an Unconstitutional Statute," in *Michigan Law Review*, March, 1929, and "The Effect of an Unconstitutional Statute in the Law of Public Officers," in *Univ. of Pennsylvania Law Review*, December, 1928.

[11] 118 U. S. 425. *Cf.* Chicago, Indianapolis and Louisville Ry. v. Hackett (228 U. S. 559); Louisiana v. Pilsbury (105 U. S. 278).

[12] Norwood v. State (Miss.) (101 So. 366); Brewer v. State (Ala.) (39 So. 927); State v. Greer (Fla.) (102 So. 739).

[13] *Ex parte* Siebold (100 U. S. 371).

State, would have no other legal relief than an appeal to the executive for a pardon, or to the legislature for a refund to him of the fine he may have paid. In other words, the fact that the law under which he was convicted has been declared void, and, therefore, as a logical proposition, has never had any force, cannot operate to reverse the final judgment of the court which has convicted him, and it might be that, if he should obtain a writ of habeas corpus the return would be that he was held under a final judgment of a competent court.[14]

The general doctrine that no legal rights or obligations can accrue under an unconstitutional law is applied in civil as well as criminal cases. However, in the case of taxes levied and collected under statutes later held to be unconstitutional, the taxpayer cannot recover unless he protests the payment at the time made. This, however, is a special doctrine applicable only in the case of taxes paid to the State. Thus, in transactions between private individuals, moneys paid under or in pursuance of a statute later held to be unconstitutional, may be recovered, or release from other undertakings entered into obtained. Bonds issued by the State as well as by municipal corporations under an unconstitutional statute are held void even though in the hands of innocent purchasers, unless, as will elsewhere be shown, the purchase has been made subsequent to, and in reliance upon, an earlier holding of the highest court of the State that the bonds or other securities had been constitutionally issued. This situation arose in Gelpcke v. Dubuque [15] and in other cases affirming the doctrine of that case. These cases are particularly discussed in the present volume in the chapter dealing with the "Obligation of Contracts." [16]

Although an unconstitutional statute cannot create legal rights or obligations, it has been held by the Supreme Court that where individuals have in good faith acted to their detriment under a statute believed by them to be valid, but later held to be invalid, a moral or equitable obligation upon the part of the State may be created sufficient to support an appropriation of public moneys for their indemnification.[17]

Although, as has been seen, an unconstitutional statute must, from the strictly logical point of view, be regarded as never having had any potency to create legal rights or obligations, practical considerations have led some of the State courts to ascribe a certain validity to acts committed by persons exercising in good faith powers conferred by acts which are later held to be unconstitutional. This is in accordance with the general principles of law which govern *de facto* officers or corporations.[18]

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[14] But see 39 L. R. A. 449.

[15] 1 Wall. 175.

[16] However, the well-known doctrine of estoppel by recital should be noted.

[17] United States v. Realty Co. (163 U. S. 427).

There have also been cases in which the existence upon the statute books of a measure authorizing action that has been taken, though later held to be unconstitutional, has been held to relieve from civil liability persons acting in good faith upon the assumption that the act was valid.[19] In other cases, however, persons so acting have been held civilly liable under the doctrine that everyone is presumed to know the law.[20] In Flaucher v. Camden,[21] a private citizen was held criminally liable for an act assumed by him to be legal, because of a statute, which statute was later declared by the court to be unconstitutional.

§ 8. Statutes First Held Valid and Later Invalid, and Vice Versa.

There have been not a few instances in which statutes have been held invalid, and later, when again brought before the courts, held valid. *Vice versa*, there have been instances in which statutes originally held valid have later been held invalid. In these cases the question has been raised whether the effect of the later decisions should be held in the one case to validate all acts under the statutes in question from the time of their enactment; or, in the other case, to invalidate all such acts. Logically it would seem that such should be deemed to be the effect of such later or last decisions, and such, generally speaking, but not uniformly, is the established doctrine.[22]

§ 9. Constitutionality of Laws Often Determined on a Basis of Objective Facts, Rather than of Grammatical or Logical Construction of Constitutional Provisions.

It is worth noting that the question as to the validity of a law often depends solely upon the opinion of the courts as to facts which are assumed or declared to exist by the enacting legislature, This occurs, for example, when the courts are called upon to determine whether a condemnation of private property authorized by the legislature is for a public purpose, or whether a regulation of public service is a reasonable one, or, if a matter of rate establishment is involved, whether it is so low as to be confiscatory in character, and therefore to be a denial of due process of law, or whether a given occupation is so "affected with public interest" as to be subject to public regulation, or, in general, whether a procedure affecting the private rights of individuals or corporations is such as to satisfy the requirements of due process of law, or whether regulations legislatively sanctioned come fairly within the police power of the State to guard its citizens against fraud, immorality, or danger to life or health. The extent to which courts determine the constitutionality of legislative enactments, or administrative processes upon a basis of objective fact, rather than a construction of the meaning of constitutional provisions—regarding which there is usually no dispute—will especially appear in the chapters dealing with "Due Process of Law" and the "Police Power."

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[18] *Cf.* Nagel v. Bosworth (148 Ky. 807); Lang v. Mayor of Bayonne (74 N. J. L. 455).

[19] Henke v. McCord (55 Ia. 378); Shafford v. Brown (49 Wash. 307).

[20] Sumner v. Beeler (50 Ind. 341); Kelly v. Bemis (4 Gray, 83).

[21] 56 N. J. L. 248.

[22] An interesting case in which the court refused to apply this doctrine is State of Iowa v. O'Neil. See editorial note to this case in 33 L. R. A. (N. S.) 788; 147 Ia. 513; 33 L. R. A. (N. S. 788).

§ 10. The Constitutionality of a Law May Depend Upon the Special Facts of a Particular Case.

The question as to the constitutionality of law does not, in all cases, go to the essential validity of the law, that is, as applicable to any or all conditions, but may depend upon the particular facts to which it is sought to be applied. Thus, in Poindexter v. Greenhow,[23] the court said: "It is no objection to the remedy in such cases that the statute, the application of which in the particular case is sought to be prevented is not void on its face, but is complained of only because its operation in the particular instance marks a violation of a constitutional right; for the cases are numerous, where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the constitution, or because in some other way they operate to deprive the party complaining, of a right secured to him by the Constitution of the United States." [24] Thus, the cases are numerous in which the Supreme Court, in holding particular statutes unconstitutional, has qualified or explained this holding by declaring that the statutes "as construed and applied" are thus to be deemed unconstitutional.[25]

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[23] 114 U. S. 270.

[24] In Kansas City S. Ry. Co. v. Anderson (233 U. S. 325), the court said: "It is contended, however, that the statute having been declared unconstitutional as applied to one state of facts that properly raises the question, it is void for all purposes. The contention is based on the assumption that we decided the statute in the Wynne case (St. L. Etc. R. Co. v. Wynne, 224 U. S. 354) to be unconstitutional; but the ground of the decision was, as we have seen, that the statute was there applied to a case where the plaintiff in the action had recovered less than he demanded before the suit. We declined to extend our opinion to a case where the amount of the judgment corresponded to the demand; in other words, declined to pronounce the act entirely unconstitutional."

[25] See the interesting case of *Ex parte* Medley (134 U. S. 160). See also Yick Wo v. Hopkins (118 U. S. 356).

In Chastleton Corporation v. Sinclair [26] the court said: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." [27]

§ 11. Who May Question the Constitutionality of a Law.

All governmental acts, executive, legislative, and judicial, to be legally valid, must meet the requirements of the Constitution. Whether or not they do so is for the courts, in the last resort, to determine.

This is an obligation that rests upon every court, high or low, State or Federal. Reciprocally, the right to raise the question of constitutionality is possessed by every litigant. A denial to a litigant of such a right would be itself an unconstitutional act—a denial of due process of law.[28]

Every question as to the constitutionality of a governmental act, State or Federal, legislative, executive or judicial, as tested by the United States Constitution can be brought by original suit or by appeal or by *certiorari* to the Supreme Court of the United States.[29]

It is, then, the right of any litigant in any judicial proceeding to raise the question as to the constitutional basis of a right, privilege or immunity that has been asserted, and which, if allowed, will operate adversely to his own interests. Furthermore, the private individual may refuse obedience to an executive or judicial order, or to a legislative provision, upon the ground that it is not constitutional. This, however, he does at his own risk, since, if the order or act in question be finally held constitutional, he is subject to punishment for such refusal. In order that he may have this opportunity of testing in the courts the constitutionality of a law or other government action, the Supreme Court has held in a number of well-considered cases that a legislature may not attach to a law such unreasonably severe penalties for its violation that no one will dare to take the risk of incurring them in order to secure a judicial determination as to the validity of the law itself.[30]

The right of a public official, charged with the execution of a law, to refuse to act upon the ground that the law is unconstitutional is not as clear as it is in the case of the private individual who is called upon to obey the law. As a matter of general public policy, however, it would seem that a public functionary, even if willing to assume the risk of impeachment, or of removal from office, or of the civil or criminal consequences that might follow, should not refuse to execute a law which he deems unconstitutional, except where the consequences of enforcing the law will be very serious and irremediable, or, and especially, when the only way in which a case can be made up for the judicial determination of the validity of the law is by a refusal upon his part to act under the law. In a later chapter,[31] the special application of this principle to the President of the United States will be considered.

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[26] 264 U. S. 543, 547.

[27] Citing: Perrin v. United States (232 U. S. 478).

For further illustrations of cases in which laws have been held valid or invalid according to the facts to which they are applied, see the opinion in Hamilton v. Kentucky Distilleries Co. (251 U. S. 146).

[28] See *post*, Chapter LXXIX.

[29] See *post*, Chapter LXI.

[30] See *post*, § 795.

As to the right of administrative officials, in actions to enforce the performance by them of statutory ministerial duties, to question the constitutionality of the statutes imposing the duties, American courts are in conflict. Some courts have denied the right upon the ground either of public convenience, or that the official has not a sufficient personal interest in the matter; other courts have deemed it expedient, from the public point of view, that he should be permitted to raise the issue, and have called attention to the fact of his personal liability in case it should be held that his refusal was not justified. *Corpus Juris*, says: "The better doctrine, supported by an increasing weight of authority, is that a mere subordinate ministerial officer, to whom no injury can result and to whom no violation of duty can be imputed by reason of his complying with a statute, will not be allowed to question its constitutionality; but that the constitutionality of a statute may be questioned by an officer who will, if the statute is unconstitutional, violate his duty under his oath of office, or otherwise render himself liable, by acting under a void statute." [32]

In some of the States of the Union, a ministerial officer is not permitted to allege the unconstitutionality of a statute when defending against mandamus proceedings. In other States the contrary view has been held.[33]

The result is that, in many cases, a public official has to act at his peril. He becomes liable if he acts under a statute which is later held to be unconstitutional; and he is equally liable if he refuses to act under a law which he believes to be unconstitutional but which is afterwards held to be valid; and, as has been seen, in some cases he is not allowed to refuse to act even though he believes, and correctly as may later develop, that the statute directing him to act is unconstitutional. However, the Supreme Court of the United States, while recognizing the practical objections to permitting ministerial officials to question the validity of statutes directing action upon their part, seems to have recognized such a right upon their part. In Little Rock, etc., Ry. v. Worthen [34] the court said: "It may not be a wise thing, as a rule, for subordinate or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not a law; it binds no one and protects no one." It is, however, to be observed that, in this particular case, before refusing to follow the statute, the administrative official had obtained an opinion of the Attorney-General of the State that the act in question was unconstitutional. Indeed, as declared by the Supreme Court of the United States, "the conflict between the Constitution and the statute was obvious." It may be, then, that, in a less extreme case, the Supreme Court would not approve the refusal of a ministerial administrative official to act under a statute which he deems to be unconstitutional.

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[31] § 656.

[32] *Op. cit.*, vol. XII, p. 765, sec. 183. See also elaborate note in 47 L. R. A. 512.

[33] As to this conflict of views see the note in 47 L. R. A. 512. The writer of this note, by way of conclusion, says: "From the above decisions it is apparent that there is no theory which will reconcile all the conflict. There is running through the decisions, however, a thread which would furnish a logical and satisfactory rule upon the question if finally adopted. That is that statutes are generally presumed valid, and ministerial officers must treat them as such until their invalidity is established, but that if the nature of the office is such as to require the officer to raise the question, or if his personal interest is such as to entitle him to do so, he may contest the validity of the statute in a mandamus proceeding brought to enforce it. In other cases he must perform his duty as the statute requires, and leave those whose rights are affected by it to take steps to annul it."

With reference to State officials and State law, the Supreme Court of the United States has held that it will hold itself bound by the practice of the courts of the State concerned.[35]

It is generally held that an individual may not, on the ground that, in his opinion, a statute is unconstitutional forcibly resist its enforcement by an officer. This contention he may set up only in legal proceedings for relief or for civil damages for the injury done him under the statute.[36]

§ 12. Substantial Interests Must Be Involved.

The general rule is that courts will not pass upon the constitutionality of laws or other official acts except in suits duly brought before them, and at the instance of parties whose material interests will be, or have been, adversely affected by the enforcement of the laws or the recognition of the validity of the executive or judicial acts which are complained of.[37] Thus it has been held that as to acts claimed to be unconstitutional as in denial of the equal protection of the laws, only those persons may raise the point who come within the class or classes of persons discriminated against.[38]

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[34] 120 U. S. 97.

[35] Smith v. Indiana (191 U. S. 138).

[36] State v. Skinner (86 So. Rep. 716).

It thus sometimes happens that an unconstitutional legislative act is enforced for many years before its invalidity is finally determined in the courts. It also happens in some cases that it is impossible to test the constitutionality of a legislative act because no parties plaintiff or complainant can be found willing to institute suit, whose interests will be substantially prejudiced by the enforcement of the act in question.[39]

In Braxton County Court v. West Virginia [40] the court declared: "The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the State court sustaining the act, and the interest must be of a personal, and not of an official nature.[41]

§ 13. Taxpayers' Actions

In Frothingham v. Mellon [42] the plaintiff had sought, as a taxpayer, to enjoin the execution of the so-called Maternity Act of Congress. Such taxpayers' actions to enjoin the execution of municipal appropriation acts have been repeatedly entertained by the courts,[43] but, until this case, the right of a taxpayer to enjoin the execution of a Federal appropriation act had not been passed upon by the Supreme Court, except *sub silentio*. Distinguishing the status of a citizen with reference to a Federal appropriation act, from his status with reference to municipal acts, the court said:

"The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of State cases and is the rule of this court. Crampton v. Zabriskie (101 U. S. 601). Nevertheless, there are decisions to the contrary. See, for example, Miller v. Grandy (13 Mich. 540). The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. 4 Dillon, Municipal Corporations (5th Ed.) § 1580 *et seq.* But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."

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[37] Yazoo Mississippi R. Co. v. Jackson Vinegar Co. (226 U. S. 217); Jefferey Mfg. Co. v. Blagg (235 U. S. 571).

[38] See authorities cited in 12 *Corpus Juris*, 760, note 57.

[39] See, for example, Massachusetts v. Mellon (262 U. S. 447).

[40] 208 U. S. 192.

[41] Citing Clark v. Kansas City (176 U. S. 114); Lampasas v. Bell (180 U. S. 276); Smith v. Indiana (191 U. S. 138).

[42] 262 U. S. 447, 486.

[43] As to the right of the taxpayer to enjoin the execution of State appropriation acts, the decisions are conflicting, with the majority of them opposed to the right.

§ 14. Arranged or Fabricated Suits.

It is not infrequently the case that a suit is arranged between parties expressly for the purpose of raising and thus determining the constitutionality of a law. No judicial exception to this practice is made, or can properly be made, when, in fact, interests of the parties raising the issue will be adversely and substantially affected by an enforcement of the act. But when this is not the fact, or if the case has been prosecuted in such a "friendly" manner that diligent effort has not been made to have all pertinent evidence introduced and analyzed, the courts will not, upon the evidence that has been adduced, attempt to determine whether the questioned law, if enforced in the premises, will operate unconstitutionally.[44]

In Fairchild v. Hughes,[45] suit was brought in equity by a private citizen to have the Secretary of State enjoined from proclaiming the ratification of the Nineteenth Amendment. The Supreme Court, affirming the decree of the court below dismissing the bill, said: "Plaintiff's alleged interest in the question submitted [46] is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case, within the meaning of Section 2 of Article III of the Constitution, which confers judicial power on the Federal courts, for no claim of plaintiff is 'brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.' . . . Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the Federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid. Compare Giles v. Harris (189 U. S. 475); Tyler v. Judges of Court of Registration (179 U. S. 405)."

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[44] Chicago and Grand Trunk Ry. Co. v. Wellman (143 U. S. 339). A conspicuous instance in which real interests of the parties were involved, and in which the court took jurisdiction, but which, as was well known, had been arranged in order to test the validity of the Federal Income Tax Law, was Pollock v. Farmers' Loan and Trust Co. (157 U. S. 429; 158 U. S. 601). Other similar cases, which probably were "moot" cases, but only in the sense that they had been arranged by the parties to them in order to obtain the judgment of the court as to the constitutionality of the statutes involved were Hylton v. United States (3 Dall. 171); Fletcher v. Peck (6 Cr. 87); and Buchanan v. Warley (245 U. S. 60). *Cf.* Professor E. S. Corwin's able article, "Judicial Review in Action," in 74 *Univ. of Penn. Law Review,* 639, note 10.

[45] 258 U. S. 126.

[46] The plaintiff alleged that he was suing in behalf of other citizens of the United States, who were taxpayers and members of the American Constitutional League, a voluntary organization engaged in diffusing "knowledge as to the fundamental principles of the American Constitution." The bill charged that irremediable mischief would result from the promulgation of the ratification of the Amendment which, it was alleged, had not been constitutionally adopted.

§ 15. What Constitutes a "Case" or "Controversy" Arising Under the Constitution, Laws, or Treaties of the United States.

An important case in definition of what may be a "case" or "controversy" to which the judicial power of the United States extends, and in which the constitutionality of Federal statutes may be examined, is that of Muskrat v. United States.[47] This case arose under an act of Congress which undertook to confer upon the Court of Claims, and, by appeal, upon the Supreme Court of the United States, jurisdiction to entertain suits against the United States which might be brought by certain named Cherokee Indians for themselves and others similarly situated, in order to determine the validity of certain acts of Congress. This enabling act the court held to be impotent for the purpose since it attempted to vest in the Federal courts a jurisdiction not embraced within the judicial power of the United States as provided for in Art. III of the Constitution. The court found that the purpose of the suit was wholly comprised in the determination of the validity of certain acts of Congress rather than the determination of material and specific rights of the plaintiffs.[48]

§ 16. Constitutionality of a Law Will Be Considered Only When Necessary for the Decision of the Case.

In recognition of the fact that the substitution of the opinion of a court for that of the enacting legislature as to the constitutionality of a questioned law is a serious matter, all American courts guide themselves by the self-set rule that they will not declare a law unconstitutional if the case in which the question is raised can be properly disposed of in some other way.[49]

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[47] 219 U. S. 346.

[48] *Cf.* Old Colony Trust Co. v. Comr. of Internal Revenue (279 U. S. 716).

In Marbury v. Madison the Supreme Court, although it declared that it had not jurisdiction of the case, went on to lay down the law applicable to the other points at issue, excuse for so doing being that the court felt itself obligated first to determine whether or not the mandamus asked for should issue, so that, if possible, it might dispose of the case without calling into question the constitutionality of the act of Congress granting the original jurisdiction under which the suit had been brought. Whether this was a sufficient excuse is doubtful. Jefferson was vehement in criticism of the action.[50]

It may be observed that it was not only in the case of Marbury v. Madison that Chief Justice Marshall showed a willingness to discuss matters which it was not absolutely necessary to discuss in order to reach the decision finally rendered by the court. Thus, in the great case of Cohens v. Virginia,[51] the case was decided upon the ground that the act of Congress which was involved did not and was not intended to cover the acts upon which the suit had been brought. Nevertheless, Marshall invited and then refuted in his opinion the various arguments which had been advanced by the counsel for Virginia with regard to whether the suit was one against the State and therefore barred by the Eleventh Amendment; whether a writ of error properly lay from the Supreme Court to the State court; and whether the act of Congress if construed to extend to acts committed in Virginia would be constitutional.[52] It was only after these points had been argued upon a motion to dismiss the case for want of jurisdiction that the case was heard upon its merits and decided as above indicated.

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[49] See Reinecke v. Northern Trust Co. (278 U. S. 339), and cases there cited.

[50] The controversy as to whether or not the court was justified in considering and passing upon the merits of the case in Marbury v. Madison has continued to the present day. It is, however, interesting to note that, in the recent case of Myers v. United States (272 U. S. 52) the Supreme Court, speaking of the case of Marbury v. Madison, said: "The rule [to show cause why a writ of mandamus should not issue] was discharged by the Supreme Court for the reason that the court had no jurisdiction in such a case to issue a writ of mandamus. The court had, therefore, nothing before it calling for a judgment upon the merits of the question of issuing the mandamus." And, a little later in the same opinion: "However this may be, the whole statement [of the court in Marbury v. Madison that the writ in a proper case could issue] was certainly *obiter dictum* with reference to the judgment actually reached."

Cf. the article by Prof. A. C. McLaughlin, "Marbury v. Madison Again" in 14 *Am. Bar Association Journal*, 156.

[51] 6 Wh. 264.

[52] *Cf.* the discussion of this case by Professor E. S. Corwin in his article previously cited.

In the Dred Scott case [53] the Supreme Court, after holding that the lower Federal courts from which the case had come by appeal had had no jurisdiction, went on to discuss the other points raised in the record before it. The propriety of this course was strenuously objected to by the minority justices.

§ 17. Advisory Opinions.[54]

In a number of the States of the American Union it is constitutionally provided that, upon request by the executive or the legislature, the judges of the highest court of the State shall give their opinion as to the constitutionality of proposed measures or actions submitted to them. In other States it is provided that these judges may suggest to the legislature measures for the improvement of the law. In general it may be said that these opinions thus obtained are purely advisory in character, and that they do not constitute judicial precedents to control the future judgments of even the courts that render them. This has been definitely declared in Massachusetts, New Hampshire, Rhode Island, Missouri (where the practice existed from 1865 to 1875), and Florida. In Maine and Colorado, however, these decisions have been held binding.[55]

Despite Maine and Colorado, the weight of precedent, as well as the better reason and wisdom, is in favor of holding such opinions merely advisory. Such decisions do not arise out of or relate to any particular facts or particular purpose which might explain or limit the generality of their statements. The judges have not necessarily had the benefit of the hearing of counsel, and there has been no argument before them.

The opinions of the Attorney-General of the United States resemble in their advisory character these opinions of judges.[56]

A number of instances have occurred in which judges in States, whose Constitutions have not given the legislature or executive this power to call for their opinions, have refused to give them when called upon to do so. Thus, in Minnesota [57] the court held unconstitutional an act which provided that "either house may by resolution require the opinion of the Supreme Court or any one or more of the judges thereof upon a given subject, and it shall be the duty of such court, or judges thereof, when so requested respectively to give such opinions in writing."

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[53] Scott v. Sandford (19 How. 393). The question as to the propriety of the court's consideration, in the Dred Scott case, of the questions in the case, after the jurisdiction of the lower Federal court had been denied, is a very fine one, and, for its full discussion would require more space than can be here spared for it. For an excellent defence of Taney's action in this respect see the article of Professor E. S. Corwin, "The Dred Scott Case in the Light of Contemporary Legal Doctrines," in 17 *American Historical Review*, 52. See also the article by H. H. Hagen, "The Dred Scott Decision," in 15 *Georgetown Law Journal*, 95.

[54] See elaborate note in Thayer's *Cases on Constitutional Law*, vol. I, pp. 175ff.

[55] See, generally, Ellingwood, *Departmental Coöperation in State Government.*

[56] See Langeluttig, *The Department of Justice of the United States*, Chap. XII.

[57] *In re* Application of Senate to Supreme Court (10 Minn. 78).

The Pennsylvania court, however, in a similar case, gave the requested opinion without comment.[58]

In 1920, the Supreme Court of Michigan declared unconstitutional a State statute providing for the giving by the courts of declaratory judgments.[59]

In several cases, justices have refused, even in those States where the power to call for an opinion is in the Constitution, to give an opinion upon questions which it was possible might afterward come before them for adjudication. Instances of this have occurred several times in Missouri and once in Maine.

In the Constitutional Convention of 1787 it was proposed to give to the President and to Congress the right to ask opinions of the Supreme Court, but this proposal was not agreed to.[60] In 1793 President Washington, however, asked the opinion of the Supreme Court as to certain questions arising under Jay's Treaty. The court refused to answer upon the ground that it would act only in cases or controversies brought before them in due form. So, also, when Congress attempted, in 1792, to impose upon the court the exercise of functions not judicial in character, and not to be performed in a judicial manner, the court refused to act.[61]

§ 18. Executive or Administrative Discretion: Political Questions.

It is a principle adopted by all courts and with regard to all kinds of law that it does not fall within the judicial function to control the exercise of the discretionary powers which, by the Constitution or by statutes, are vested in public officials.

Though, in general, the courts will not attempt to control the exercise by executive or administrative officials of the discretionary powers vested in them by the Constitution or laws passed in pursuance thereof, nevertheless, if that discretion is exercised in such an arbitrary or unjust and discriminating manner as clearly to deny to individuals their right to the equal protection of the laws, or to due process of law, or any other constitutional right, the courts will intervene. Furthermore, the courts will hold unconstitutional any attempt upon the part of the legislature to vest in administrative officials a discretion that is essentially arbitrary in character. The application of these principles is discussed in detail in the chapters of the present work dealing with due process of law, the equality of laws, and the conclusiveness of administrative determinations.

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[58] *In re* Report of the Judges (3 Binney, 595).

[59] Anway v. Grand Rapids Ry. Co. (179 N. W. Rep. 350).

[60] 5 Ell. Deb. 445.

[61] Hayburn's Case (2 Dall. 409). For a further discussion of this point, see *post*, § 737.

A special type of executive discretion is that which gives rise to what are known as Political Questions. These questions, which are often of extreme political importance, but which the courts refuse to control, are specifically discussed in a later chapter.[62]

§ 19. Legislative Motives.

With the motives of the legislators the courts do not concern themselves. "The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of government. That it may not do with safety to our institutions." [63]

In *Ex parte* McCardle [64] the court declined to take appellate jurisdiction of the case because of the enactment by Congress of a law which it was well known had been passed for the express purpose of preventing the court from questioning the constitutionality of certain measures which the Federal Government had taken for the "Reconstruction" of the Southern States after the termination of the Civil War. "We are not at liberty," said the court, "to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

In McCray v. United States,[65] the cases upon this point were fully reviewed and the doctrine applied to a law which, upon its face, was a tax measure, but, as was alleged, had for its purpose not the raising of revenue but the discouragement of the manufacturing of oleomargarine and the protection of dairy interests. The court said: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

In Bailey v. Drexel Furniture Co.[66] the court declared invalid an act of Congress which imposed a tax upon the net income of persons employing child labor. The court found, from an inspection of the other terms of the act, that it was not a revenue measure, but one attempting the regulation of a matter reserved exclusively to the States. Distinguishing the instant case from the McCray case, the court pointed out that the law involved in the McCray case did not, upon its face, indicate that it was other than a revenue measure, whereas the Child Labor Law did so indicate: in other words, that, as to the Child Labor Law it was not necessary for the court to examine into the motives of those who enacted it, in order to determine that it was not, truly speaking, a tax law.

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[62] Chapter LXIV.

[63] Interstate Commerce Commission v. Brimson (154 U. S. 447, 473).

[64] 7 Wall. 506.

[65] 195 U. S. 27.

[66] 259 U. S. 20.

Other conspicuous cases in which the Supreme Court declined to consider the real purposes sought by Congress in the enactment of laws the unconstitutionality of which was urged, were Veazie Bank v. Fenno,[67] in which was upheld an act of Congress imposing a ten per centum tax upon the circulating notes of persons and State banks; and United States v. Doremus [68] and United States v. Jin Fuey Moy,[69] in which was upheld a Federal act imposing a special tax on the manufacture, importation and sale, or gift of opium or coca leaves or their derivatives, and laying down elaborate rules as to registration of those entitled to sell or prescribe these drugs, and as to reports to be rendered as to sales made or prescriptions given. In the last of these cases the court said: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." In United States v. Doremus, the court said: "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it."

In Hill v. Wallace, [70] decided at the same time as Bailey v. Drexel Furniture Co., the court held invalid the act of Congress of August 24, 1921, known as the Grain Futures Trading Act, which imposed a tax upon contracts for the sale of grain for future delivery and provided for the regulation of boards of trade. After reciting the various provisions of the act, the court said: "Our decision just announced, in Bailey v. Drexel Furniture Co., involving the constitutional validity of the Child Labor Tax Law, completely covers this case,"—in other words, the court held that the act upon its very face, that is, by the various regulatory conditions which it imposed, bore evidence to the fact that it was not, in essential character, a revenue measure. No necessity therefore existed for the court to speculate as to the motives of those who enacted it.

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[67] 8 Wall. 553.

[68] 249 U. S. 86.

[69] 241 U. S. 394.

[70] 259 U. S. 44, 67. See also Smith v. Kansas City Title and Trust Co. (255 U. S. 180).

§ 20. Policy or Wisdom of Legislation Not Subject to Judicial Determination.

The constitutional power of a lawmaking body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to judicial criticism or control.

This principle is so well established that citations do not need to be adduced in its support. It is none the less probably true that judges have at times permitted their own estimates as to the desirability or undesirability of laws brought before them to influence their opinion both as to whether or not such laws should be held to be in harmony with constitutional requirements, and as to what construction should be given to the words of the acts. The charge that they have been so influenced, unconsciously if not consciously, has been frequently made by dissenting judges in the opinions which they have filed. A conspicuous instance of this was charged by Justice Harlan in his dissenting opinion in the Standard Oil case [71] in which case it was held by the majority that the prohibitions of the Anti-Trust Act of 1890, though not explicitly so stated, were directed against only such contracts as are in unreasonable restraint of interstate commerce.

§ 21. Cautionary Considerations with Regard to the Holding of Statutes Unconstitutional.[72]

The preceding sections have dealt with what may perhaps be termed the intrinsic limitations upon the power of the courts to question the constitutional validity of the acts of the coördinate legislative branch of their government. We have now to deal with certain further restraints which, from prudential or politic reasons, or from a proper respect for the opinions of the legislature, the courts have laid upon themselves when exercising the right to refuse enforcement to statutes deemed by themselves to be unconstitutional.

One of these self-set cautionary limits which the courts have laid upon themselves is that contained in the rule that in cases of reasonable doubt the constitutionality of acts of Congress will be upheld. How vigorously the Supreme Court has applied this rule will be considered in the next chapter which deals with "Principles of Constitutional Construction."

Another limit set to itself by the Supreme Court is that, ordinarily, it will not hold void an act of Congress except by a majority of the full bench. Thus, in 1825, the Court of Appeals of Kentucky refused to follow a decision of the Supreme Court of the United States, which had held a law of Kentucky void as contrary to the Federal Constitution, stating, as a reason, that the decision had not been concurred in by a majority of the entire court. After this occurrence the Supreme Court adopted the rule as stated above. In New York v. Miln,[73] decided in 1834, Marshall said: "The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four justices [the court then consisted of seven] concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four justices do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

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[71] Standard Oil Co. v. United States (221 U. S. 1).

[72] The term Cautionary Considerations is borrowed from the excellent article by Professor E. S. Corwin entitled "Judicial Review in Action" in 74 *Univ. of Penn. Law Review*, 639.

A further rule repeatedly affirmed by the Supreme Court is that, when it is possible to do so without doing too great violence to the words actually used, the language of a statute will be so restricted as to render the measure constitutional.[74] For it is always presumed that Congress does not intend to exceed its constitutional powers. Where, however, the scope of the law is plainly expressed, and as such is unconstitutional, the court will not resort to a strained or arbitrary interpretation in order to render the law valid. Thus in Howard *v.* Illinois Central R. Co.[75] the court declined to restrict the terms of a law with reference to the liability of a common carrier for injury to "any of its employees" to such employees only as should be injured while engaged in interstate commerce, and thereby to render the statute valid as applied within the States.

§ 22. Separableness of Statutes.

The court will not permit the unconstitutionality of a particular provision of a law to invalidate the entire law if it is possible to separate the invalid provision from the other provisions without destroying or impairing their efficiency to attain the results evidently intended by the legislature that enacted it. Even when thus separable, however, the court will not hold the remainder of the law valid if there is doubt whether, the realization of the whole of its will being rendered impossible, the legislature would have desired the execution of a part only. Thus, in the case of Howard v. Illinois Central R. Co.,[76] the court, having held that the act by its terms related to intrastate as well as interstate commerce, declined to hold the act valid even as to employees engaged in interstate commerce.

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[73] 8 Pet. 120.

[74] "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars Indemnity Co. v. Jarman (187 U. S. 197). And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States v. D. & H. Ry. Co. (213 U. S. 366). See also U. S. v. Jin Fuey Moy (241 U. S. 394).

[75] 207 U. S. 463. *Cf.* James v. Bowman (190 U. S. 127); and U. S. v. Reese 92 U. S. 214).

The foregoing are but instances of many cases in which the "separableness" of statutes has been considered. In result, it is clear that the courts possess and exercise a wide discretionary power in determining whether or not an invalid provision may be separated from the other provisions of an act, so as to leave valid those other provisions. In this matter the courts speculate freely as to what would probably have been the desires of the enactors of the law had they known that effect would not be given to those provisions of the law which the courts find to be unconstitutional.

§ 23. Construction by Federal Courts of State Laws and Constitutions.

Except when some Federal power, right, privilege, or immunity is involved, the construction to be given to the laws and constitutions of the States is a matter for final and conclusive determination by the courts of the States whose laws or Constitutions are respectively concerned.[77]

In cases in which the constitutionality of a State law as tested by the constitution of that State is raised, the Federal courts are loth to pass adversely upon the question prior to a determination of it by the courts of that State. Thus, in Louisville and N. Ry. Co. v. Garrett,[78] the Supreme Court said: "So far as we are advised the court of appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a State statute to be in conflict with the constitution of the State before that question has been considered by the State tribunals,—to which it properly belongs—unless the case imperatively demands such a decision.[79] Here the argument against the statute is not of that compelling character."

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[76] 207 U. S. 463. See also Butts v. Merchants and Miners Transportation Co. (230 U. S. 126).

[77] See *post*, § 567.

[78] 231 U. S. 298.

[79] Citing Pelton v. Commercial National Bank (101 U. S. 143); Michigan Central Ry. Co. v. Powers (201 U. S. 245).

CHAPTER III

PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION

§ 24. Presumption in Favor of the Constitutionality of an Act of Congress.

American courts have reiterated the doctrine that an act of a coördinate legislative body is not to be held unconstitutional if, by any reasonable interpretation of the Constitution or of the statute itself, the two can be harmonized. It does not need to be said, however, that opportunities have been offered for differences of opinions as to whether, in every case, the courts have, in fact, resolved every possible constitutional doubt in favor of the validity of its legislative enactments. Especially has there been a basis for this doubt when the courts have had to deal with statutes which seem to encroach upon rights secured to the people by express constitutional provisions. In the earlier cases in which the courts were called upon to consider the limitations placed by these constitutional provisions upon the so-called police power of the States, or upon the analogous regulatory powers of the United States, it would almost seem as though the courts held that the statutes were to be deemed presumptively invalid. In their more recent decisions, however, the courts have usually been guided, even as to these laws, by the general rule of interpretation which they have so often avowed.

§ 25. Presumption in Favor of the Constitutionality of a State Statute. The rule of construction that has been under consideration has especial application to acts of Congress. When the constitutionality of a State law is involved, the principle is not always applicable. If the question at issue is as to whether a given power resides in the Federal Government or in the States, the fact that a State legislature in its enactment has asserted that it is vested in the States, is no presumption in favor of the validity of the decision. The Supreme Court in passing finally upon this point is not, then, called upon to review the act of a coördinate department, but has to decide between the conflicting claims of two governments, and, quite properly, feels itself at liberty to decide the point as an original proposition; namely, upon the basis of its own judgment as to what is the most reasonable construction of the constitutional provisions involved.

If, however, the State law, whose constitutionality is questioned, is with reference to a matter admittedly within the province of the States, and the question is simply whether that power has been properly exercised, there is held to be a strong presumption that the act is constitutional. Thus, for example, if it is a question whether the States have the power to regulate interstate commerce, or to tax a national bank, or to naturalize aliens, or to enact bankruptcy laws, the presumption is not in favor of the constitutionality of acts in which the State power is asserted. If, however, it is a question, for example, whether the police powers, admittedly belonging to the States, have been constitutionally exercised, the presumption is that they have been so exercised.[1]

In those cases in which the courts of the States are called upon to consider the constitutionality of the acts of their own lawmaking bodies as tested by the Federal or their own State Constitutions, they of course have to deal with the acts of a department of government coördinate in power with themselves; and, therefore, they hold themselves, or at least should hold themselves, bound in all cases to give to the laws that same benefit of rational doubt which the Federal Supreme Court gives to acts of Congress.

In concluding this subject, it is proper to observe that, inasmuch as this legislative or executive interpretation of constitutional powers has such an importance as we have seen attached to it, the responsibility for its proper exercise is proportionately great. Those legislators, therefore, who vote for a measure without being honestly convinced of its constitutionality, and excuse themselves upon the ground that, if their action is not valid, the courts have the opportunity so to declare, are recreant to their duty. Not only, as we have seen, may serious consequences follow from these acts before their invalidity is judicially determined, but, what is of still more importance, an unfortunate burden is thrown upon the courts. No popular government can successfully endure in which the decisions of its courts do not receive the general approval of the citizen body. But, if legislatures recklessly pass measures ostensibly for the benefit of the masses, but invalid when tested by the fundamental law, the odium of defeating these measures is thrown upon the courts, and a popular objection to and distrust of these courts created. For, of course, the people generally cannot be expected to appreciate the constitutional questions involved. All that they can see and appreciate is that their legislative representatives have enacted a measure in their interests, which the courts have declined to recognize as valid.

§ 26. The Force of Contemporaneous or Long Continued Legislative Interpretation.

The presumption of constitutionality which attaches to an act of Congress is increased when the legislative interpretation has been frequently exercised during a considerable number of years, or when it dates from a period practically contemporaneous with the adoption of the Constitution, or when, based upon a confidence in its correctness, many and important public and private rights have become fixed.

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[1] For an excellent illustration of this, see Powell v. Pennsylvania (127 U. S. 678).

In United States v. State Bank [2] the court, speaking through Justice Story, said: "It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal consideration, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

The foregoing had references to the construction of a statute, but the same reasoning is applicable to the Constitution.

In Lithographic Company v. Sarony [3] the court declared: "The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the Convention who framed it, is of itself entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." [4]

In Swigart v. Baker [5] the court, with reference to the interpretation to be given to the Reclamation Act of Congress of June 17, 1902, referred to the practical construction which had been given to the act since its adoption by the Secretary of the Interior, and then went on to say: "If there could be any doubt as to the meaning of the statute, it disappears in the light of congressional construction which may properly be examined as an aid in its interpretation."

§ 27. Legislative and Executive Practice Not Absolutely Binding.

The Supreme Court, however, has never held itself absolutely bound by a legislative or executive construction (political questions excepted), however long acquiesced in, or however contemporaneous their first statement with the adoption of the Constitution.[6]

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[2] 6 Pet. 29.

[3] 111 U. S. 53.

[4] See also Stuart v. Laird (I Cr. 299); Schell's Executors v. Fauché (138 U. S. 562); Lewis Publishing Co. v. Morgan (229 U. S. 288); The Okanogan, etc., Indian Tribes v. United States (The Pocket Veto Case) (279 U. S. 655).

[5] 229 U. S. 187. As to the great weight to be attached to a long and consistent construction of a statute by the executive department charged with its administration, see United States v. Jackson, and cases there cited (280 U. S. 183, 193).

§ 28. Extrinsic Evidence.

Generally speaking, in the construction of the Constitution the well-known distinctions between latent and patent ambiguities, and between the use of extrinsic and intrinsic evidence apply. Where the language of the instrument is itself indefinite or is such that more than one meaning may, by grammatical construction, be drawn from its terms, the courts base their determinations upon the language and provisions found within the four corners of the instrument, and without resort to extrinsic evidence. The governing point is as to what is actually written. If a given power may rationally, logically, and grammatically be construed as granted by a given provision, then it is of no countervailing force to adduce the fact that such was not the intention of those by whom the instrument of government was established. Thus, six years after the adoption of our Constitution, the judicial power of the Federal courts was construed to extend to a case in which a State was defendant in a suit brought by a private individual, and support for such construction was undoubtedly supplied by the written word. That such, however, was not the intention of those by whom the Constitution was framed and ratified is quite certain, as was demonstrated by the promptness and unanimity with which the Eleventh Amendment was adopted, preventing a future similar construction.[7]

§ 29. Technical Terms.

When, however, there is no ambiguity of grammatical construction, but the words themselves require definition, recourse is properly had to extrinsic evidence. Here it is necessary to learn from extrinsic sources the meaning usually attached to these words at the time the Constitution was framed and, presumably, by those who framed and adopted the Constitution. Examples of such terms are "letters of marque and reprisal," "*ex post facto*," "bill of attainder," "bankruptcy," "admiralty," "equity," "direct tax," "duties," "imposts," "excises," "piracy," "habeas corpus," "citizen," "alliance," "confederation," "republican form of government," "infamous crime," "commerce," etc. The technical term "treason" is defined in the Constitution itself.

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[6] In Swift v. United States (105 U. S. 691), the court said: "The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt."

In United States v. Alger (152 U. S. 384) the court said: "As the meaning of the statute as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In Fairbank v. United States (181 U. S. 283) the constructive force to be given to legislative and executive practice is reviewed at length. With reference to the principle that the judiciary cannot be conclusively bound thereby the court says: "From this résumé of our decisions it clearly appears that practical construction is relied upon only in cases of doubt." See also United States v. Graham (110 U. S. 219).

[7] As to the use of extrinsic evidence, see United States v. Missouri Pac. R. Co. (278 U. S. 269).

One of the principal questions involved in the Dred Scott case was as to the definition of the term "citizen of the United States," as employed in Article III of the Constitution. The Insular cases in considerable measure turned upon the meaning to be ascribed to the expression "United States." In Texas v. White it was necessary to enter into a careful definition of the terms "State" and "government" in order clearly to distinguish them.

As has been repeatedly declared by the courts the best rule for interpreting the technical terms employed in the Constitution is to give to them the meaning which they had at the time that instrument was framed and adopted. When the terms are technical law terms they are to be given the meaning attached to them in the English law.[8]

In a few instances it is, however, to be observed, that the Supreme Court has refused to give to technical terms the meanings attached to them in 1789 by the common law. This has been so especially with reference to the words "admiralty" and "bankruptcy," both of which terms have been given a broader meaning than that furnished by the English common law.[9]

§ 30. The Interpretative Value of Debates in Constitutional Conventions.

When it is necessary and proper to resort to extrinsic evidence in interpreting the Constitution, an important source of such evidence is to be found in the history of the events which led up to its adoption. Of special importance are the recorded proceedings of the convention which drafted, of the State conventions which ratified, and of the public utterances of the men who played an influential part in the establishment, of the Constitution. Resort is to be had, however, to these sources only with caution, and only where latent ambiguities are to be resolved.[10]

§ 31. The Federalist.

What has been said regarding the interpretative value of the debates in the conventions that framed and ratified the Constitution, and the value of contemporary interpretation thereof by Congress and the Executive, applies to the collection of essays published under the title of *The Federalist.* This is true peculiarly of these essays not only because of their respective authors—Hamilton, Madison and Jay—but because of the purpose for which they were prepared and published, namely, to persuade the several State conventions to ratify the Constitution. Having this construction of the Constitution before them, there are considerable, though not conclusive, grounds for holding that the meaning thus published and not repudiated, was the construction intended by those who put the Constitution into force.[11]

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[8] "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law." Smith v. Alabama (124 U. S. 465). See also United States v. Wong Kim Ark (169 U. S. 649).

[9] See *post* §§ 590, 408.

[10] *Cf.* Cooley, *Constitutional Limitations*, 7th ed. 101, for the reasons for this caution.

The case of Chisholm v. Georgia [12] is, however, a conspicuous instance in which a view advanced in *The Federalist* (that a State would not be suable in the Federal courts at the instance of a citizen of another State) was repudiated by the Supreme Court.[13]

§ 32. The Interpretative Value of Legislative Debates.

As in the case of the examination of the Constitution itself, the courts in considering the constitutionality of a statute hold themselves bound by the words of the statute, that is, they determine the intent of the legislature by the words it has employed. And, therefore, they will not resort to legislative debates except where necessary to clear up a latent ambiguity. It should, however, be said that, for purposes of statutory construction the courts show a greater readiness to resort to legislative proceeding than they do for purposes of constitutional construction.[14]

Generally, as to the policy of the courts with regard to the use of legislative debate for interpretative purposes, it may be pointed out that there would seem to be peculiar reasons why they should be resorted to for this purpose when the question is as to the "separability" of different provisions of the same statute; for here it is necessary for the courts to ascertain, so far as they can, what would probably have been the desires of the legislative bodies; that is, whether, granting the invalidity of certain portions of the measures enacted by them, that they would have wished the other provisions of the statutes to be given effect, notwithstanding the resulting defeat of their wishes as to such invalidated provisions.

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[11] In the case of Cohens v. Virginia (6 Wh. 264) Marshall said: "The opinion of *The Federalist* has always been considered as of great authority. It is a complete commentary on our Constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the Constitution, puts it very much in their power to explain the views with which it was framed. These essays having been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it."

[12] 2 Dall. 419. See criticism of this case in Hans v. Louisiana (134 U. S. 1).

[13] For discussion and citation of the instances in which the Supreme Court in its opinions has referred to *The Federalist*, see the article by Charles W. Pierson, "The Federalist in the Supreme Court," in 33 *Yale Law Journal*, 728.

[14] *Cf.* Maxwell v. Dow (176 U. S. 581); and United States v. Trans-Missouri Freight Assn. (166 U. S. 290).

§ 33. Reports of Congressional Committees.

It would appear that, for the interpretation of ambiguous or uncertain statutory provisions, the courts will more readily resort to declarations of legislative intent contained in reports of congressional committees, or in statements of the chairmen of such committees, than in the records of the debates attending the enactment of the statutes. Thus in Lapina v. Williams [15] the court, while referring to the unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress,[16] nevertheless resorted to reports of the Senate and House committees, and quoted freely from them in order to show what was the intent of the Immigration Act of February 20, 1907, with regard to the deportation of alien prostitutes.

So, also, in Church of the Holy Trinity v. United States,[17] considerable reliance was laid upon the report of a congressional committee in order to determine the interpretation to be given to an act of Congress. The same was true of the case of Knepper v. Sands,[18] in which the court said in justification of an examination of the report of a congressional committee: "While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet it is also true that we have examined the reports of the committees of either body with a view to determining the scope of statutes passed on the strength of such reports."

In Johnson v. Southern Pacific Co.[19] the court, in search of the legislative intent, considered not only the reports of congressional committees, but the recommendations made by the President of the United States to Congress.

In Caminetti v. United States [20] we find the statement: "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation." [21] In a dissenting opinion filed in this case, Justice McKenna said: "Of course, neither the declarations of the report of the committee on interstate commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed, besides, of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act, and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of the committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the measure it recommends has the purpose it declares and will accomplish it as declared. This being the purpose, the words of the statute should be . . . . so construed even if their literal meaning be otherwise."

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[15] 232 U. S. 78.

[16] As to this the court cites United States v. Trans-Missouri Freight Assn. (166 U. S. 290).

[17] 143 U. S. 457.

[18] 194 U. S. 476.

[19] 196 U. S. 1.

[20] 242 U. S. 470, 490.

The statement contained in the last sentence is, perhaps, too strongly made, for only in extreme cases, that is, when to follow the literal language of an act will produce an obviously unjust or unreasonable result, do the courts hold themselves free to depart from the meaning of a statute as expressed in its words, literally construed.

In Duplex Printing Press Co. v. Deering [22] it was declared: "By repeated decisions of this Court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law making body.[23] But reports of committees of House and Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure.[24] And this has been extended to include explanatory statements in the nature of a supplemental report made by the Committee member in charge of a bill in course of passage." [25] Justice Pitney, who spoke for the court in this case, appended to his opinion liberal extracts from the *Congressional Record* in support of the construction given by the court to the statute involved in the case.[26]

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[21] Citing Blake v. National City Bank (23 Wall. 307); Bate Refrigerating Co. v. Sulzberger (157 U. S. 1); Chesapeake & Potomac Tel. Co. v. Manning (186 U. S. 238); Binns v. United States (194 U. S. 486).

[22] 254 U. S. 443.

[23] Citing Aldridge v. Williams (3 How. 9); United States v. Union P. R. Co. (91 U. S. 72); United States v. Trans-Missouri Freight Assn. (166 U. S. 290).

[24] Citing Binns v. United States (194 U. S. 486).

[25] Citing Binns v. United States (194 U. S 486); Penna. R. Co. v. International

§ 34. History of the Times.

In Standard Oil Co. v. United States [27] the court, while reaffirming the doctrine that congressional debates might not be used as a means for interpreting a statute, nevertheless declared that that rule was not violated by resorting to such debates "as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted." This "environment" of the period when the law is enacted, the court held, has an evidential value for the determination of the general purpose of the act and, therefore, of the general spirit or manner in which the act is to be interpreted and applied. Thus, in the instant case, with reference to the Anti-Trust Act of 1890, the court held that, in the light of such environment, as, in part at least evidenced by the debates in Congress at the time of its enactment, there was doubt as to whether there was a common law of the United States, which, in the absence of legislation, would govern the matters of contracts or combinations in restraint of interstate or foreign trade, or the monopolizing or attempt to monopolize such trade; and that the main cause which led to the Act of 1890 was the thought that such legal regulation was needed.

In Church of the Holy Trinity v. United States [28] the court said: "Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."[29]

A notable instance in which the circumstances leading up to the adoption of a constitutional provision, and the purposes sought to be achieved by that provision as shown by such circumstances, were employed in order to determine the meaning of that provision, is shown in the court's determination of the construction to be given to the Sixteenth Amendment.[30]

Coal Mining Co. (230 U. S. 184); United States v. Coca Cola Co. (241 U. S. 265); United States v. St. Paul, M. & M. R. Co. (247 U. S. 310).

[26] See also Binns v. United States (194 U. S. 486); and United States v. St. Paul, M. & M. Ry. Co. (247 U. S. 310).

[27] 221 U. S. 1.

[28] 143 U. S. 457.

[29] See also United States v. Union Pacific R. Co. (91 U. S. 72).

[30] See *post*, § 261. See also, Prigg v. Pennsylvania (16 Pet. 539), in which the history of the times was employed in construing the constitutional favour of the Federal Government with reference to the surrender of fugitive slaves.

§ 35. Preamble to the Constitution.

The value of the Preamble to the Constitution for purposes of construction is similar to that given to the preamble of an ordinary statute. It may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, where the intention of the framers does not clearly and definitely appear. As Story says: "The preamble of a statute is a key to open the mind of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute." [31]

Special significance has at various times been attached to several of the expressions employed in the Preamble to the Constitution. These expressions are:

1. The use of the phrase "We, the People of the United States," as indicating the legislative source of the Constitution.
2. The denomination of the instrument as a "Constitution."
3. The description of the federation entered into as "a more perfect Union."
4. The enumeration of "the common defence" and "general welfare" among the objects which the new government is established to promote.

That the Preamble may not be resorted to as a source of Federal authority is so well established as scarcely to need the citation of authorities. As the court says in Jacobson v. Massachusetts,[32] "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted."

§ 36. "We, the People."

As regards the phrase, "We, the People," as used in the Preamble, it would seem that little light can be obtained from its use, except to fix the fact, which no one has attempted to deny, that the new government derived its right to be from the consent of the people who were to be controlled by it. But whether by "We, the People" was meant all the people of the ratifying States considered as one body politic, or whether it referred to the people as organized in several commonwealth communities, it is, so far as this language is concerned, impossible to say.

The framers of the Constitution of the Southern Confederacy avoided this ambiguity by declaring in the Preamble: "We, the People of the

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[31] *Commentaries*, § 459.

[32] 197 U. S. 11.

Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice . . . do ordain and establish this Constitution for the Confederate States of America."

In Martin v. Hunter's Lessee [33] Justice Story said: "The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'"

Story, in his *Commentaries*, elaborates this argument that the Constitution, so far from being the creation of the governments of the several States, declares itself to be ordained and established by the People of the United States, which, asserts Story, makes it evident that the People, when so acting, regarded themselves as an aggregate or national unit.

This last argument is certainly extreme. It is indeed made plain that the Constitution is not ratified by the governments of the individual States, but it is not clearly indicated whether the ratifying parties are to be considered singly or as a composite whole. And in contradiction to the fact that a single political whole was meant is the fact that in ratifying the Constitution the people did vote by States.[34]

The only way by which the force of this fact is avoided is by the proposition that the ratifying State conventions acted *ad hoc* as agents of a single united people. But this argument is greatly weakened, if not absolutely destroyed, by the fact that only those States were to be considered members of the New Union whose respective peoples, acting in convention, should ratify the Constitution.

The use of the phrase "We, the People of the United States," as indicating the ordainers and establishers of the Union, is, however, of significance in determining the nature of the Union that was intended to be created when taken in connection with the provision of Article VII that the Constitution was to be ratified, not by the State legislatures, but in conventions, for it indicates that the Union was one which the State legislatures were not competent to create; that, in other words, it was to be not a mere league or confederacy, such as the existing State governments might enter into, but a fundamental Union resulting in the creation of a new National State which, according to the political philosophy of that date, only the people acting in their original sovereign capacity were able to create.

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[33] 1 Wh. 304.

[34] The fact that the States are not, as in the Articles of Confederation, mentioned, individually, by name, is of no significance for the fact is that they could not be so mentioned because it could not be known in advance which of the States would ratify.

§ 37. "Constitution."

The fact that the instrument of 1789 is termed a "Constitution" has by some been taken to indicate that a National State, and not a confederacy of States was intended to be created. Thus Webster in his reply to Hayne said: "They [the people of the United States] undertook to form a general government which should stand on a new basis; not a confederacy, not a league, not a compact between States, but a Constitution." And in his reply to Calhoun, he declared: "Sir, I must say to the honorable gentleman that, in our American political grammar, Constitution is a noun substantive; it imports a distinct and clear idea of itself; and it is not to be turned into a poor, ambiguous, senseless, unmeaning adjective, for the purpose of accommodating any new set of political notions. . . . By the Constitution we mean, not a 'constitutional compact,' but simply and directly the Constitution, the fundamental law; and if there be one word in the language which the people of the United States understand, it is that word." And later he said: "Does it call itself a compact? Certainly not. Does it call itself a league, a confederacy or subsisting treaty between the States? Certainly not. But it declares itself a Constitution."

By members of the school of Webster weight is also given to the fact that it is declared that the people of the United States "do ordain and establish" and not that they "do contract" or "enter into a treaty."

The writer of this treatise is not disposed to ascribe much value to this argument of Webster based upon the use of the word "Constitution." At most it can only have a corroborating value. In the first place, it is by no means certain that the term had, in 1789, the definite technical meaning which Webster ascribes to it. And, in the second place, the nature of the Union provided for by the Constitution is properly to be determined by the distribution of powers actually provided for by it, and not by the title that may have been given to it.

The description of the new federation in the Preamble as "a more perfect Union" has occasionally been referred to as an argument of the complete sovereignty of the United States. For example, in Texas v. White,[34a] Chief Justice Chase, after referring to the fact that the Articles of Confederation had provided for a perpetual Union, says: "And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be more indissoluble if a perpetual Union, made more perfect, is not?"

[34a] 7 Wall. 700.

§ 38. The Constitution Is to Be Construed as a Whole.

Though the terms of the Constitution may not be varied, or its grants of authority limited by abstract doctrines of private rights and of political justice and expediency, the words of each clause are to be interpreted in the light of the other provisions of the Constitution. The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of all the other parts.[35]

This principle has been of dominant force in the construction of the Constitution.

The principle that the Constitution is to be interpreted in the light of the general purpose for the attainment of which it was adopted, coupled with the fact that many of its terms are general in character, has made possible and legitimate two schools of constructionists—the Loose or Nationalistic school, and the Strict or States' Rights school—each dependent upon a belief held as to the general end which the framers of the Constitution had in mind when that instrument was drafted. The Strict or States' Rights constructionist has not always been one who would deny sovereignty or efficiency to the National Government. Thus, Taney, a leader of the strict constructionists, never for a moment doubted the sovereignty of the General Government, or, as he showed in Ableman v. Booth, (21 How. 506) the supremacy of its laws and of its agents over the laws and agents of the States. He did believe, however, that the sovereign national laws should be kept within as limited a space as possible. This he showed from the first year of his chief-justiceship.

From the general nature and intent of the Constitution have been deduced, not to mention other doctrines, the denial of the right of secession, the power of the courts to hold void State or Federal laws contrary to the Constitution, the jurisdiction of the Federal Courts to entertain appeals from the highest State courts in cases in which a Federal right, privilege, or immunity has been set up and denied, the immunity of Federal governmental agencies from interference on the part of the States by taxation or otherwise, the immunity of State agencies from Federal taxation, the exclusive Federal jurisdiction in matters of naturalization, and the liberal construction of "implied" powers generally.

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[35] "In construing the Constitution of the United States we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts." Story, *Commentaries*, § 405.

§ 39. So-called "Natural" or "Unwritten Constitutional" Laws Have No Constructive Force.

The so-called "natural" or unwritten laws defining the natural, inalienable, inherent rights of the citizen, which, it is sometimes claimed, spring from the very nature of free government, have no force either to restrict or to extend the written provisions of the Constitution. The utmost that can be said for them is that, where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty.

In not a few instances, especially during early years, the binding force of natural laws is declared, but a careful examination of these cases shows that, practically without exception, the doctrine was used not as the real *ratio decidendi*, but to support, upon grounds of justice and expediency, a decision founded upon the written constitutional law.

Prior to the separation from England, the colonial courts were naturally inclined to minimize the power of the English Parliament, and, therefore, to uphold Coke's *dictum* in Bonham's case (8 Coke 113b.) that an act of Parliament contrary to natural rights and justice is void. And in the political controversies which preceded the Revolution the doctrine of natural rights was relied upon.[36] It would appear, however, that, though often asserted by the courts, no legislative act was held void solely because it was conceived to exceed the proper limits of all legislative power.[37]

When American independence came, it was to be expected that the Americans would apply the doctrine of natural rights and justice in limitation of the lawmaking powers of their own legislatures, and thus, as said, we do find the principle not infrequently stated, during the early years of the Constitution.[38] Even Chief Justice Marshall lent it, upon occasion, a qualified sanction. "It may well be doubted," he observes in Fletcher v. Peck [39] "whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the [State] legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection." [40]

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[36] For instance by Otis in his arguments against writs of assistance.

[37] As to whether the South Carolina case of Bowman v. Middleton (1 Bay, 252), was such a case, see Thayer, *Cases on Const. Law*, I, p. 53, note 2.

[38] *Cf.* Stimson, *Handbook of American Labor Law*, p. 4, note.

[39] 6 Cr. 87.

[40] One of the clearest statements of the doctrine, though given *obiter*, is that of Justice Chase in Calder v. Bull (3 Dall. 386).

§ 40. The "Spirit" or Theory of the Constitution.

Closely allied to the assertion that the Constitution is to be interpreted in the light of "natural law," is the doctrine that the fundamental purpose of the constitutional fathers was the erection of a free republican government, and that, therefore, the Constitution should, whatever its express terms may provide, never be so construed as to violate the abstract principles deducible from this fundamental fact. Generally speaking, whereas the so-called natural laws have reference to the private rights of the citizen, the protection of his person and property, these principles claimed to be deducible from the spirit of the Constitution as the framework of a free government have reference to the public and political rights of the individual.

Stated in this abstract, philosophical form, the doctrine that the "spirit" of the Constitution is to prevail over its language has no more legal validity than has the doctrine of natural law.

However, as is the case when dealing with principles of natural law or of natural justice, the courts, including the Supreme Court of the United States, have, at times, referred to the "spirit" or the general purpose of the Federal Constitution for the purpose of strengthening its argument in behalf of a particular construction of the powers granted or withheld by that instrument.[41]

It is, perhaps, worthy of mention that non-suability of the United States by its own citizens, as well as (since the Eleventh Amendment) the non-suability of a State of the Union by its own citizens, was placed upon a basis of general public law rather than upon any specific provision of the Federal Constitution. Indeed, the generality of the language of Article III of the Constitution was held to be limited by the principle of public law that a sovereign State could not be sued without its consent. It is true that, prior to the adoption of the Eleventh Amendment, the Supreme Court had held in Chisholm v. Georgia,[42] that a State of the Union might, under the terms of the constitutional grant of Federal judicial power, be sued by a citizen of the United States, but in Hans v. Louisiana,[43] the Supreme Court declared that that holding had been an erroneous one. The Court, appealing to a general doctrine of law rather than to the text of the Constitution, said: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law."[44]

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[41] See Loan Association v. Topeka (20 Wall. 655), in which what would seem to be rather loose language was employed by the majority of the Court. As to this, see Fallbrook Irrigation District v. Bradley (164 U. S. 112). The opinion of Mr. Justice White, concurred in by Justices Shivas and McKenna, in Downes v. Bidwell (182 U. S. 244), also contains what, to the author, seems unwise statements regarding the "spirit" or theory of the Constitution.

[42] 2 Dall. 419.

[43] 134 U. S. 1.

It is the opinion of the author, that a resort to the "spirit" or "theory" of the Constitution for interpretative purposes is an unwise policy. The line of distinction between conclusions which may be validly drawn from the general purpose of the Constitution and of the nature of the Union or Government intended to be provided for by that instrument, and the conclusions which may not, with constitutional propriety, be drawn from the "spirit" of the Constitution, may not always be easy to draw, but the distinction itself is a clear and logical one. The resort to the general nature and purpose of the Constitution in order to determine doubts not otherwise resolvable is a legitimate practice, sustainable by general principles governing the construction of written instruments; but the resort to the "spirit" of the Constitution, in order either to sustain an exercise of governmental power or to impose a limitation upon it which is not provided for by the instrument itself, is not a valid practice, since it stands in essential opposition to the other rules which the court has declared fundamental for determining the power granted to or limitations imposed upon the Federal Government by the Constitution.[45]

§ 41. Applicability of Constitutional Provisions to Modern Conditions.

In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to these new conditions.

Thus, the grant to the Federal Government of the control over interstate and foreign commerce is held to be one the extent of which, though not its importance, is not varied by the fact that the instrumentalities by which it is carried on are widely different from those employed in 1789. On the other hand, if the writing of insurance policies, or the dealing in banking instruments of exchange were not, in 1789, considered interstate commercial transactions, and by reason of their very nature could not properly have been, no augmentation in their amount and no increase in the practical need for their Federal regulation will justify a construction that will attach an interstate commercial character to them, and thus bring them within the power of the Federal Government to control.

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[44] See *post*, Chapter entitled, "The Suability of the State."

[45] See especially the rule regarding the express and implied powers of Congress.

The principle, as it has been stated, does not prevent a construction by which the powers and limitations enumerated in the Constitution are made applicable to new conditions of fact which were not and could not have been foreseen by those who adopted the Constitution. As said in *Re* Debs,[46] "Constitutional provisions do not change, but their operation extends to new matters as the modes of life and habits of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown. . . . Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Though the terms of the Constitution may not be altered to meet new conditions, except by the process provided by the Constitution for its own amendment, the relative importance of certain of its provisions has changed as new social, political and commercial problems have presented themselves. Thus, in time of war the powers of the President as Commander-in-Chief of the Army and Navy have found wide application: during the "Reconstruction Period" the provision that the United States should guarantee to the States governments republican in form was resorted to in order to endow the Federal Government with authority to establish and maintain in the States which had sought to separate themselves from the Union governments of a character approved by Congress. For thirty-five years after the Constitution was adopted, the Commerce Clause of the Constitution received but little judicial examination, and, not until the decision in 1824 of the case of Gibbons v. Ogden, was the importance of this clause in its possible restraining power upon the States clearly stated, and not for many years after then was this restraint rigidly enforced. Not until 1887 did Congress place upon the Federal statute books a measure in affirmative regulation of commerce among the States. At the present time, however, this grant to the Federal Government of the right to regulate commerce with foreign nations and among the several States is turned to as the chief source of constitutional authority upon the part of the National Government to regulate such commerce, and, by means of such regulation, to deal with many of the great social and economic problems to which modern industrial life has given rise, and for the solution of which the States have shown themselves either constitutionally or administratively incompetent, or, if competent, indisposed to deal with. In the matter of the restraint of both congressional and State legislative action, the due process of law provisions of the Fifth and Fourteenth Amendments have, during recent years, found frequent application, owing partly to the disposition of the State legislatures and of Congress to subject commerce and industry to legal regulation, and partly, it must be confessed, to a gradual opening of the eyes of the courts to the possibilities of judicial restraint upon legislative and executive action presented by the right vested in the courts to determine, both as matters of substantive law and as matters of procedure, what is to be deemed a denial of due process of law.[47]

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[46] 158 U. S. 564. *Cf.* South Carolina v. United States (199 U. S. 437).

§ 42. Stare Decisis.

There have been a considerable number of cases in which the Supreme Court has explicitly and avowedly overruled its prior decisions, but there have been more instances in which the doctrines declared in prior cases have been in part evaded or modified without explicit repudiation.

Taney in the Passenger cases [48] said: "I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to be founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

In Washington University v. Rouse [49] Justice Miller said: "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of a court."

There are indeed good reasons why the doctrine of *stare decisis* should not be as rigidly applied to the constitutional as to other laws.

In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of *stare decisis*. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the court's repudiating or modifying its former decision.[50]

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[47] Closely connected with due process of law is the equal protection of the laws.

[48] 7 How. 283.

[49] 8 Wall. 439.

In the dissenting opinion of Mr. Justice Brandeis in State of Washington v. Dawson [51] we find the following statement with regard to the propriety upon the part of the Supreme Court of departing from its earlier doctrines if it has come to consider those doctrines as erroneous: "The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many." [52]

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[50] *Cf.* Baldwin, *American Judiciary*, pp. 56–57.

[51] 264 U. S. 219.

[52] In a footnote Mr. Justice Brandeis gives the following instances in which the court has refused to be bound by the doctrine of *stare decisis:*

Lee v. Chesapeake & Ohio Ry. Co. (260 U. S. 653, 659), overruling *Ex parte* Wisner (203 U. S. 449); Terral v. Burke Construction Co. (257 U. S. 529, 533), overruling Doyle v. Continental Insurance Co. (94 U. S. 535), and Security Mutual Life Insurance Co. v. Prewitt (202 U. S. 246); Boston Store v. American Graphophone Co. (246 U. S. 8, 25), and Motion Picture Co. v. Universal Film Co. (243 U. S. 502, 518), overruling Henry v. Dick Co. (224 U. S. 1); United States v. Nice (241 U. S. 591, 601), overruling Matter of Heff (197 U. S. 488); Pollock v. Farmers' Loan & Trust Co. (158 U. S. 601), overruling Hylton v. United States (3 Dall. 171); Roberts v. Lewis (153 U. S. 367, 379), overruling Giles v. Little (104 U. S. 291); Brenham v. German American Bank (144 U. S. 173, 187), overruling Rogers v. Burlington (3 Wall. 654), and Mitchell v. Burlington (4 Wall. 270); Leisy v. Hardin (135 U. S. 100, 118), overruling Peirce v. New Hampshire (5 How. 504); Morgan v. United States (113 U. S. 476, 496), overruling Texas v. White (7 Wall. 700); Legal Tender Cases (12 Wall. 457, 553), overruling Hepburn v. Griswold (8 Wall. 603).

To these cases might also be added that of Garland v. Washington (232 U. S. 642), in which the court, basing its judgment upon the dissenting opinion of Mr. Justice Peckham in Crain v. United States (162 U. S. 625) said: "Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we are now constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled." Also to be added is Blackstone v. Miller (188 U. S. 189) which was overruled by Farmers Loan and Trust Co. v. Minnesota (280 U. S. 204, 209).

CHAPTER IV

THE DIVISION OF POWERS BETWEEN THE UNITED STATES AND ITS MEMBER STATES

§ 43. Federal Powers.

The United States Constitution serves a double purpose. It operates as an instrument to delimit the several spheres of Federal and State authority, and to provide for the organization of the Federal Government. In this chapter we shall be concerned with only the first of these two subjects. That *quæstio vexata* of the original purpose of the Constitution, whether intended to serve as an agreement between sovereign compacting States, or as the fundamental instrument of government of a single sovereign people, it is fortunately no longer necessary to discuss. For the purpose of a treatise on the constitutional law of the United States as it exists to-day it is sufficient to describe the Constitution as a legal instrument distributing governmental powers between the Federal and State Governments, according to the general principle that the powers granted the Federal Government are specified, expressly or by implication, and that the remainder of the possible governmental powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [1]

It will have been noticed that in speaking of the powers possessed by the General Government, the term "delegated" is used, whereas, in speaking of the powers possessed by the States, the word "reserved" is employed. This exhibits the fundamental principle governing the division of powers between the General Government and the States according to which the former possesses only those powers that are by the Constitution granted to it, whereas the States are entitled to all powers except those expressly or by implication denied to them by the Constitution. Thus the General Government is commonly spoken of as one of enumerated and the State Governments as governments of unenumerated powers.

This distinction would in all probability have been recognized and adopted by the Supreme Court as a logical corollary from the general character of the Constitution, had there been no express direction in that instrument itself to such effect. Out of superabundant caution, however, the Tenth Amendment was adopted.

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[1] Tenth Amendment. As to certain of the powers granted to the Federal Government, as will presently appear, the fact that they may be exercised by that government does not, until they are so exercised, deprive the States of the authority to exercise them.

The phrase "or to the people" covers these powers which, though constitutionally exercisable by the States, for aught the Federal Constitution has to say, are, by their own State Constitutions, denied to their respective governments. Thus, the Federal and the State Constitutions differ in this important respect, that the grants of the former operate to endow the General Government with powers that it would not otherwise possess, whereas the provisions of the latter in the main operate to deprive the governments which they create of powers they otherwise would possess.

Except when expressly limited, as, for instance, where the power which is given to levy taxes is restricted by the provisions that "all duties, imposts, and excises shall be uniform throughout the United States," that "no tax or duty shall be laid on articles exported from any State," and that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken," a power granted to the Federal Government is construed to be absolute in character.

§ 44. Express and Implied Powers.

Though the Federal Government is one of enumerated powers, its powers are not described in detail, and from the very beginning it has been held to possess, not simply those powers that are specifically or expressly given it, but also those necessary and proper for the effective exercise of such express powers. After enumerating the various powers that Congress is to possess, the Constitution declares: [2] "[The Congress shall have power] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Furthermore it will be noticed that in the Tenth Amendment, above quoted, the powers reserved to the States or to the people are not those not expressly delegated to the United States, but simply those not delegated. This is significant in view of the fact that in the corresponding section in the Articles of Confederation the word "expressly" is carefully inserted.[3]

§ 45. Federal Powers to Be Liberally Construed.

The Constitution is, in terms and general character, a grant of powers —a grant from the people of the several States to the National Government, and, strictly speaking, as in all grants of power, the authority that may be exercised thereunder is to be limited to powers specifically granted or impliedly given. But, whereas, in general, grants of authority are strictly construed as against the grantee and in favor of the reserved rights of the grantor, in the case of the Federal Constitution this principle has not been applied. The justification for this has been deduced from the general nature of the Constitution as an instrument of government, and from the character of the end which was sought to be obtained by its establishment. The Federal Government exists, not for the benefit of those who exercise its powers, but to subserve the national interests,—political, industrial, and social,—of the people who framed and adopted it. While, therefore, it is, in essential character, a grant of powers, and is to be construed as such, its terms are to be interpreted in the light of the fact that the people in adopting it desired the establishment and maintenance of an effective National Government, and therefore one endowed with powers commensurate with that end.[4]

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[2] Art. I, Sec. 8, Cl. 18.

[3] Article II. "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States in Congress assembled."

§ 46. Strict Construction a Corollary of the States' Rights Doctrine. Without in any way questioning the validity of the rule of construction stated in the preceding paragraphs, it is to be observed that its propriety is absolutely dependent upon the prior assumption that the Federal Government exists as the agent of the people, and not, as declared by the States' Rights theory, as the agent of the States. Had the theory which conceives the United States to be a confederacy of sovereign States, and its government as the agent of these creating component units, been accepted, it would have logically followed that a doctrine of strict construction of Federal powers would have been appropriate, for then these powers would have been in direct derogation of the rights reserved by the States that granted them. Strict construction, while thus a logical corollary of the States' Rights theory, is not required by the nationalistic theory.

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[4] "In construing a grant or surrender of powers by the people to a monarch, for his own benefit or use, it is not only natural, but just, to presume, as in all other cases of grants, that the parties had not in view any large sense of the terms, because the objects were a derogation permanently from their rights and interests. But in construing a constitution of government, framed by the *people* for their own benefit and protection, for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessarily arises. . . . The powers given by the people to the General Government are not necessarily carved out of the powers already confided by them to the State governments. They may be such as they originally reserved to themselves. And, if they are not, the authority of the people in their sovereign capacity, to withdraw power from their State functionaries, and to confide it to the functionaries of the General Government, cannot be doubted or denied. If they withdraw the power from the State functionaries, it must be presumed to be, because they deem it more useful for themselves, more for the common benefit and common protection, than to leave it where it has been hitherto deposited. . . . The State governments have no right to assume that the power is more safe or more useful with them, than with the General Government; that they have a higher capacity and a more honest desire to preserve the rights and liberties of the people than the General Government." Story, *Commentaries*, §§ 413–415. See, to the same effect, the argument of Chief Justice Marshall in Gibbons v. Ogden (9 Wh. 1).

§ 47. The James Wilson-Roosevelt Doctrine of Construction.

A doctrine of construction radically different from that which has just been stated, and which has never been accepted by the Supreme Court, is one which has been ascribed to James Wilson of Pennsylvania, and in later years urged by President Roosevelt.[5]

This doctrine is, that when a subject has been neither expressly excluded from the regulation power of the Federal Government, nor necessarily left within the exclusive control of the States, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the States are, in practical fact, unable to exercise the necessary controlling power. According, then, to this doctrine, the Ninth and Tenth Amendments which declare that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," are not to be interpreted as reserving to the States, or to the people, those powers which, though not granted to the Federal Government, are, in fact, such as are of Federal importance and which the States are unable effectively to exercise.

This doctrine is quite different from the established doctrine of implied powers as developed by Marshall, a doctrine which will be presently discussed. That doctrine, as it will be seen, holds that from an expressly given Federal power there may be implied those powers which are necessary and proper for effectively exercising it. The doctrine thus does not justify, under any circumstances, the assumption of an independent power by the Federal Government. The Wilson-Roosevelt doctrine on the other hand asserts that a subject not originally within the sphere of Federal control, may, by mere change of circumstances, be brought within the Federal field. Thus, to illustrate concretely, it might be argued according to the doctrine of implied powers that as implied in authority expressly granted to Congress to regulate foreign and interstate commerce, Congress might compel all corporations or individuals manufacturing commodities for foreign or interstate commerce to obtain a Federal license, such a license to be granted upon such terms as Congress might see fit to dictate. According to the Wilson-Roosevelt doctrine, however, it could be argued that the control of manufacturing is not expressly denied the Federal Government nor expressly placed within the exclusive control of the States, and that, under existing industrial conditions it being of Federal importance that these manufacturing concerns, or certain of them, should be regulated, and the States being incompetent to furnish the necessary regulation, therefore, the Federal Government has the power.

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[5] See his speech at the dedication of the Pennsylvania capitol buildings at Harrisburg.

Here, it will be seen, there is no resort whatever to the commerce clause, or to any other express grant of power. The doctrine is thus one which in the absence of express prohibition in the Constitution will support the assumption by the Federal Government of any power whatsoever if there be fair ground for holding that regulation is needed and that the States are not able to furnish it.

In Kansas v. Colorado,[6] substantially this Wilson doctrine was urged upon the court, the argument being, as summarized by Justice Brewer, that: "All legislative power must be vested in either the State or the National Government, no legislative powers belong to a State government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States."

In refutation of this argument Justice Brewer said: "But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. . . . The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated."

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[6] 206 U. S. 46, 89, 90.

§ 48. "Necessary and Proper."

In pursuance of the foregoing principles the Supreme Court of the United States has, from the very beginning, declared that the powers thus impliedly granted the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words "necessary and proper," it was early held, were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere. Thus in the case of the United States v. Fisher,[7] decided in 1804, Marshall declared: "It would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution."

§ 49. McCulloch v. Maryland.

The classic statement, however, of the scope of the "implied" powers of Congress is that made by Marshall in the opinion which he rendered in McCulloch v. Maryland.[8] In that great case, the Chief Justice said: "It may with great reason be contended, that a government, entrusted with such ample powers [as is the United States] on the due execution of which the happiness and prosperity of the Nation so vitally depends, must be entrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means."

The determination of what are appropriate means must, Marshall went on to declare, belong to the government which is to employ them. "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

To the argument that a selected means must be an indispensable as well as a proper one Marshall replied: "Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another."

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[7] 2 Cr. 358, 408, 409.

[8] 4 Wh. 316.

Concluding his argument upon this point, Marshall said: "we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." [9]

One further fact regarding the implied powers of Congress is to be noticed. This is that a power employed as incidental to the exercise of an express power may be used free from the limitation under which it would rest if exercised as an express power. Thus, in Veazie Bank v. Fenno [10] and Head Money Cases [11] the Supreme Court decided that the power of taxation when used simply as a means for regulating commerce and currency, is not subject to the constitutional limitations under which it would rest if exercised for the purpose of raising a revenue. In the Head Money Cases the court declared, relative to a *per capita* tax levied by Congress upon persons, not citizens of the United States, coming to this country: "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of Veazie Bank v. Fenno, the enormous tax of eight per cent. per annum on the circulation of state banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created. . . . It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

§ 50. Primary and Incidental Powers of Federal Agencies Constitutionally Distinguished.

From the cases of McCulloch v. Maryland, Osborn v. Bank of United States, and later cases, there is clearly deducible the constitutional doctrine that, as to institutions created or provided for by the United States, those functions are fundamental or primary in character which are concerned with the performance of services for the Federal Government, and that this is so, even if the activities thus authorized constitute but a small, and in other than governmental or constitutional aspect, a relatively unimportant part of the total activities of these institutions. If, in other words, an institution serves, in any way as a Federal agency, it may be given incidental powers to any extent, and even as to matters that would not otherwise be within the grant of Congress, if these powers can be reasonably held to be ancillary to, or their exercise in any way an aid in the performance by the institution of its primary powers as a Federal agent.

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[9] *Cf.* Smith v. Kansas City Title & Trust Co. (255 U. S. 180). See also McGrain v. Daugherty (273 U. S. 135).

[10] 8 Wall. 533.

[11] 112 U. S. 580.

§ 51. Resulting Powers.

Story in his *Commentaries on the Constitution of the United States* [12] refers to a type of implied powers which he terms "Resulting Powers"—those "arising from the aggregate Powers of the National Government," rather than as implied from some specifically granted power. He says: "It will not be doubted, for instance, that, if the United States should make a conquest of any of the territories of its neighbors, the National Government would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specifically enumerated. . . . Other instances of resulting powers will easily suggest themselves."

As thus stated, this doctrine of resulting powers approaches dangerously near to the one that would derive Federal powers from the predicated "inherent sovereignty" of the United States, the impropriety of which is discussed in a later section. The doctrine of resulting powers becomes a valid one only when it is held to mean that, in some cases, a Federal power may be implied from several or a group of enumerated powers rather than from any single one of them.[13]

§ 52. Legislative Power Deduced from the Treaty-Making Power.

It would seem to be established that Congress may enact laws appropriate for carrying into effect treaties entered into by the United States, even though this requires legislation with regard to matters not specified by the Constitution as subject to congressional regulation.[14]

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[12] Book III, Chapter XXIV.

[13] This proper use of the doctrine was stated by Marshall in Cohens v. Virginia (6 Wh. 264). It was also correctly applied by the court in United States v. Gettysburg Electric Ry. Co. (160 U. S. 668), when, with reference to the right of the United States to exercise the power of eminent domain it was said: "The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be

§ 53. Legislative Power Deduced from a Grant of Judicial Power.

In one instance, at least, as will be seen in the chapter dealing with the admiralty jurisdiction of the Federal courts, an important Federal legislative power has been deduced from a grant of judicial power. Article III of the Constitution declares that the judicial power of the United States shall extend to "all cases of admiralty and marine jurisdiction." The law to be applied in the exercise of this jurisdiction, it has been held, may be supplied by Congress.[15]

§ 54. International Sovereignty and Responsibility as a Source of Implied Powers.

Starting from the premise that in all that pertains to international relations the United States appears as a single sovereign nation, and that upon it rests the constitutional duty of meeting all international responsibilities, the Supreme Court has deduced corresponding Federal powers. In Fong Yue Ting v. United States [16] that court said: "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

Thus, from this general source has been deduced the implied power of the United States to punish the counterfeiting in this country of the securities of foreign countries, the authority to annex by statute unoccupied territory, to establish in foreign countries judicial tribunals, to lease and administer foreign territory, to exclude or to expel from our shores undesirable aliens, and in general to exercise by treaty or statute all those powers properly comprehensible under the term "foreign relations" which other sovereign States possess and exercise. The extent of the Federal Government's treaty-making powers will receive special treatment in a later chapter. It is sufficient to point out in this place that decisions of the Supreme Court have established the doctrine that in the exercise of its treaty-making powers, and in fulfilling its international responsibilities, the United States may exercise regulative control over matters which are not within the legislative power of Congress and which are in general reserved to the States. In short, it may be stated as an established principle of our constitutional law that the supreme purpose

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grouped together, and an inference from them may be drawn that the power claimed has been conferred."

[14] See *post*, § 210.

[15] See *post*, § 599.

[16] 149 U. S. 698.

of our Constitution is the establishment and maintenance of a State which shall be nationally and internationally a sovereign body, and, therefore, that all the limitations of the Constitution, express and implied, whether relating to the reserved rights of the States or to the liberties of the individual, are to be construed as subservient to this one great fact. As will later be shown, this, of course, does not mean that constitutional limitations are without any significance when the Federal Government is dealing, through its treaty-making or other powers, with foreign States, but that their application is to be determined in the light of the general doctrine that, in its foreign relations, the United States appears as a fully sovereign State and with all the rights and powers thereunto appertaining except so far as expressly limited by the Constitution itself or impliedly by the nature of the Government for which that instrument provides.

In Mackenzie v. Hare [17] the court sustained the right of Congress to provide that an American woman marrying a foreigner should lose her American citizenship upon the ground that such a marriage might involve international complications, and, hence, might attach to such marriage the same results as would follow from her physical expatriation. "As a government," the court said, "the United States is invested with all the attributes of sovereignty. As it has the character of nationality, it has the powers of nationality especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."

§ 55. Inherent Sovereign Powers.

Sometimes confused with, but quite distinct from, the doctrine which ascribes to the Federal Government plenary authority in matters international, and quite different also from the doctrine of resulting powers, is that theory which argues the possession generally by the United States of "inherent" sovereign powers; that is, powers regarded not as implied in express grants of authority, whether singly or collectively considered, but as flowing directly from the simple fact of national sovereignty. The two former doctrines are fairly deducible from the doctrine of implied powers. The latter doctrine, upon the contrary, would derive Federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.

There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers. Chief Justice Taney in denying the President the right to authorize a suspension of the writ of habeas corpus explicitly repudiated the doctrine. "Nor can any argument be drawn," he said, "from the nature of sovereignty, or the necessities of government for self-defense in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution and neither of its branches can exercise any of the powers of government beyond those specified and granted." [18]

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[17] 239 U. S. 299.

Unfortunately, however, the Supreme Court has not always been as careful as it might have been in denying the propriety of an argument based upon the inherent sovereign rights of the National Government. Although it has never actually justified the exercise of a power by the Federal Government upon this ground, it has several times used language suggesting its validity. An examination of the cases in which they were delivered discloses, however, that, in each instance, they were *obiter*, the power that was sustained being actually justified as a resulting or implied power. In the Insular Cases the doctrine was strongly urged upon the court but received no countenance; and, in Kansas v. Colorado,[19] a case in which the doctrine was set up in a somewhat disguised form, the court was emphatic in its repudiation.

§ 56. National Supremacy as a Source of Federal Power.

As resulting powers, may be included all those powers which the Federal Government finds it convenient or appropriate, not so much for carrying into effect powers specifically granted, as for maintaining in general the supremacy of the National Government and its laws. Thus, to quote the words of the court in *Re* Quarles: [20] "The United States are a Nation, whose powers of government, legislative, executive, and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

§ 57. Administrative Necessity as a Source of Federal Power.

Since the close of the Civil War the sovereignty of the National Government has been undisputed. Starting with this as a fundamental premise, constitutional development of the last forty years has been in the direction of endowing the Federal Government with administrative powers adequate for the accomplishment of the purposes for which it is acknowledged to exist. Just as the doctrine of implied powers has been used to broaden the scope of Federal authority at the expense of the reserved rights of the States, so the principle of administrative efficiency has been employed to permit the field of individual rights to be entered. Thus in a remarkable series of cases the courts have permitted the exercise by Federal administrative officials of degrees of administrative discretion that would have startled constitutional jurists of but a generation ago. It is, however, to be observed that, in this line of cases, the courts have not conceded that administrative necessity or convenience can endow the Federal Government with a power not expressly or impliedly granted to it, but, rather, that this necessity or convenience can be relied upon to justify certain of the ways in which these granted powers may be exercised. Illustrations of the foregoing will appear in the chapters dealing with "due process of law."

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[18] *Ex parte* Merryman (*Taney's Reports*, p. 246).

[19] 206 U. S. 46.

[20] 158 U. S. 532.

It is important to note that the acts of the Federal Government referred to in this section as held justified by administrative necessity infringe only on the private rights of individuals. The justification of them by the court has not served to transfer State powers to the Federal Government. Such a transfer could not properly be upheld upon the ground of a conceived national necessity.

§ 58. General Welfare.

Among the purposes enumerated in its Preamble for the securing of which the Constitution is ordained and established is the promotion of the General Welfare. That the Preamble may, in certain cases, be resorted to for the purpose of determining the meaning of ambiguous provisions in the body of the instrument, but that it may not be viewed as itself a source of Federal power has been already pointed out. However, the phrase General Welfare is also used in the body of the Constitution, namely, in Art. I, Sec. 8, which provides that Congress shall have the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Determined, but unsuccessful, efforts have been made by those anxious to magnify the powers of the Federal Government, or to support the constitutionality of specific proposed or enacted measures of Congress, to have this provision construed as a comprehensive grant of power to the United States to take any action which, conceivably, may aid in the common defence or promote the general welfare of the people of the United States.

It is evident that the acceptance of such a doctrine would at once transform the Federal Government from one of enumerated into one of unenumerated powers, and thus destroy one of the fundamental features of the Federal Constitution.[21]

§ 59. Appropriating Power of Congress as a Source of Federal Authority. It might seem more systematic to treat of the power of Congress to provide for the spending of the public moneys of the United States in connection with the other powers of Congress. It is necessary, however, to treat of it in this place because it is concerned with the general question as to the distribution of powers between the United States and the States.

The power of Congress to make appropriations is nowhere specifically provided for in the Constitution. It is, therefore, an implied power,—a power that may be exercised whenever necessary and proper for carrying into execution any of the specifically granted powers. In general, therefore, it may be said that if Congress has the constitutional power to provide that a thing shall be done it has the implied power to authorize the expenditure of such public moneys of the United States as are needed for that purpose. It has just been seen that Congress has been granted the express power to lay and collect taxes, duties, imposts and excises in order to obtain the means for providing for the common defence and general welfare of the United States. From this grant there results the implied power to Congress to appropriate for these purposes the money so obtained by the United States. Hence it is that, though Congress has not a general legislative power to provide that the Federal Government may do everything, whether by way of regulation or of direct control and operation, which may conceivably secure the common defence and promote the general welfare of the United States, it nevertheless has a general power to appropriate the public moneys of the United States for these purposes. In other words Congress can appropriate money from the Federal treasury in aid of projects which it cannot, by law, regulate or provide for their being carried out by Federal agencies.[22]

It scarcely needs be pointed out that a considerable number of the administrative services now carried on by the National Government and maintained by Federal appropriations, depend for their constitutionality wholly upon the power of Congress to authorize the expenditure of public moneys for the promotion of the general welfare of the United States. Among such services which are to a very slight, if any, extent concerned with matters directly connected with the exercise of powers specifically or by implication vested in the Federal Government, may be mentioned the Public Health Service, the Bureau of Education, the

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[21] Generally, as to the Federal powers of taxation, see *post*, Chapter XXXVI.

[22] For a full discussion of this see Willoughby, *The Constitutional Law of the United States*, vol. I, § 62.

Geological Survey, the Bureau of Mines, the Department of Agriculture, with its many bureaus, the Bureau of Fisheries, the Bureau of Labor Statistics, the Children's Bureau, the Women's Bureau, the Smithsonian Institution, the National Gallery of Art, the Bureau of American Ethnology, the Astrophysical Observatory, and, many of the special services in various of the other administrative departments of the Federal Government.

§ 60. Limitations upon the Appropriating Power.

The preceding sections have shown that upon the mere appropriation of public moneys by Congress there are few effective constitutional limitations. It undoubtedly is true that an appropriation of public money for a purely private purpose would be unconstitutional, as will later be more particularly shown in connection with the discussion of the taxing powers of Congress, but it is clear that, granting this, it will not often be possible to bring this contention, in any specific case, before the courts in such a form that they will feel themselves bound to pass upon it,—always there will be the questions whether the plaintiff has a sufficient pecuniary interest involved, whether the suit is not one against the United States or the State, and whether the matter at issue is not a political and therefore non-judiciable one.

This much, however, it is reasonably safe to say, that the appropriating power of Congress does not go further than to authorize the expenditure of public moneys of the United States and to provide instrumentalities or rules and regulations whereby assurance may be had that the moneys thus appropriated will be actually used for the purposes for the attainment of which their expenditure has been authorized by Congress. Thus methods of disbursement, and forms of audit and control may be fixed, and Federal boards or other instrumentalities created for making these payments and supervising their application to the purposes declared by Congress. Such powers of Federal control would clearly be incidental to, or implied in, the appropriating power. But this, it may be predicted, will be as far as the courts will permit Congress to go. In other words, they will not admit that, because Congress has the power to lend Federal financial aid to projects which concern the general welfare of the United States, even though these projects have no relation to the matters enumerated in the Constitution as within Federal control, therefore, Congress may authorize the Federal Government, through its own agencies, to carry out these non-enumerated projects. Thus, while Congress may appropriate money in aid of education within the States, and see that it is properly expended, it cannot authorize the Federal Government itself to undertake educational works within the States. And the same principle applies with reference to all other matters the control of which is not expressly vested in the Federal Government or implied in the powers thus expressly granted.

The foregoing distinction between controlling the expenditure of Federal appropriations, and the execution of the projects in aid of which the appropriations are made is a clear enough one conceptually. It is to be admitted, however, that, in actual practice, the line between the two may not be so easy to draw. The drawing of this line, however, in cases properly brought before them, will have to be undertaken by the courts.

It is provided that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

This restriction, it is apparent, operates rather upon the officials of the Treasury Department than upon Congress. The legislative body is left free to authorize such expenditures as it may see fit, and to direct the payments to be made by the Secretary of the Treasury. This direction having been given by law, no discretionary power is left with the Treasury Department to determine whether the payment is a proper one.[23]

That money once covered into the United States Treasury may not, by a judicial process, be recovered therefrom without the sanction of an act of Congress, is further discussed under the title "Suability of the United States." [24]

§ 61. Bounties.[25]

The constitutionality of bounties has never been squarely passed upon by the Supreme Court. Their validity was questioned in Field v. Clark [26] and United States v. Realty Co.,[27] but in neither case did the court find itself obliged to decide the point. The ground upon which the constitutionality of bounties has been contested has been that their payment amounts to an appropriation of public moneys primarily for a private purpose. The courts have often held that an expenditure in the public interest is not invalidated by the fact that incidentally private interests are advanced thereby; but in general they have held that an appropriation primarily and directly for the furtherance of private interests is not validated by the fact that incidentally public interests are in a measure promoted.[28]

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[23] United States v. Price (116 U. S. 43).

[24] *Post*, Chapter LXVII.

[25] For the definition of bounties see Downs v. United States (187 U. S. 496).

[26] 143 U. S. 649.

[27] 163 U. S. 427.

[28] See Lowell v. Boston (111 Mass. 454); and Loan Association v. Topeka (20 Wall. 655). *Cf. Harvard Law Review*, V, p. 320, article by C. F. Chamberlayne entitled "The Sugar Bounties."

§ 62. Alleged Invasion of State Fields of Action by Means of Federal Appropriations.

The constitutionality of conditional grants of money from the Federal treasury, which have been conditioned upon the doing by the States of certain things which have been especially numerous during recent years, has been contested by some on the ground that their purpose and effect is to bring under Federal control matters constitutionally within the exclusive control of the States. This contention reached the Supreme Court in Massachusetts v. Mellon and Frothingham v. Mellon.[29]

Space cannot be spared to consider these cases in which the validity of the "Maternity Act" of Congress of November 23, 1921, was contested, but, as to them, it may be said that it was held that neither the States nor their individual citizens were able to present an issue that would warrant judicial action.[30] The court, however, strongly intimated that, if it had found itself compelled to pass upon the merits of the case, it would have held that Congress had not exceeded its constitutional powers.

§ 63. Florida v. Mellon.

A point similar to that considered in the preceding section was raised in the case of Florida v. Mellon,[31] decided in 1927. Here it was charged by the plaintiff State that the States were practically coerced with reference to a matter exclusively within their constitutional competence by the provision of the Federal Revenue Act of February 26, 1926,[32] which provided that taxpayers should be allowed, up to a certain amount, a credit upon their Federal estate taxes of similar taxes paid under State laws. Therefore, it was charged, the provision was an unconstitutional invasion of States' rights in that it furnished an inducement to, that practically amounted to coercion upon, the States to levy estate taxes in order that their citizens might have the advantage offered by the Federal law. The validity of the Federal provision was also attacked upon other grounds. The court, in the opinion which it filed, though it noted the fact that this invasion of States' rights had been charged, made no attempt to refute the charge but contented itself with refuting the other attacks that had been made upon the validity of the provision.[33]

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[29] 262 U. S. 447.

[30] *Cf.* Wilson v. Shaw (204 U. S. 24), in which a citizen of the United States vainly attempted to obtain a judicial order restraining the Secretary of the Treasury from paying out money from the Federal treasury in the purchase of property for the construction of the Panama Canal, or of borrowing money for that purpose as authorized by the act of Congress of June 22, 1902.

[31] 273 U. S. 12.

[32] 44 Stat. at L. 69.

[33] For a fuller discussion of this case, see the article by A. W. Machen, Jr., "The Strange Case of Florida v. Mellon," in 13 *Cornell Law Quarterly*, 351.

§ 64. Express Limitations upon the Federal Government.

The express limitations upon the powers of the Federal Government are in part limitations upon the manner of exercise of powers expressly given; as, for example, that direct taxes shall be apportioned among the several States according to their respective populations, that naturalization, bankruptcy, and tariff laws shall be uniform throughout the United States, etc., and in part absolute prohibitions upon the exercise, in any manner, of the powers specified. These absolute provisions are to be found, in the main, in Section 9 of Article I and in the first eight Amendments.

From the very first it has been decided by the Supreme Court that the prohibitions contained in these Amendments apply only to the United States. This was first authoritatively declared by Marshall in the case of Barron v. Baltimore, [34] decided in 1833, and the correctness of this decision has not been since questioned by either the Federal or State courts.

In regard to these first eight Amendments it has sometimes been said that it was only an excess of caution that required their incorporation in the Federal Constitution. Inasmuch as the United States was to have only the powers expressly or impliedly given it, it was asserted that the General Government would have been, in the absence of such express limitations, without the authority to exercise the powers that these Amendments enumerate. However, a consideration of the construction which several of the provisions of these Amendments have received, especially during recent years, makes it evident that these express limitations upon the Federal Government have been of great importance.[35]

§ 65. Implied Limitations upon the Federal Government.[36]

The implied limitations upon the Federal Government are: first, those implied in the express limitations; and second, those which arise from the general nature of the American Federal State. The Constitution looks to a preservation of the several States in the administrative autonomy that is allotted to them, and from this is deduced the principle that the Federal Government may not, unless it be absolutely necessary to its own efficiency, interfere with the free operation of State governments by way either of imposing upon them the performance of duties, or of unduly restraining their freedom of action by way of taxation or otherwise.

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[34] 7 Pet. 243.

[35] See *post*, Chapters LV, LVI.

[36] See the able article of W. F. Dodd, "Implied Powers and Limitations in Constitutional Law," in 29 *Yale Law Journal*, 137.

The principles governing the deduction of implied limitations upon the Federal Government are the same as those applicable to the construction of implied powers.[37]

§ 66. Exclusive and Concurrent Powers.

The legislative powers possessed by the Federal Government may be divided into two classes: the one embracing those powers the exercise of which is exclusively vested in the General Government; the other those which, in default of Federal exercise, may be employed by the States.

Some of the powers granted by the Constitution to the General Government are expressly denied to the States. As to the exclusive character of the Federal jurisdiction over these there cannot be, of course, any question. It has, however, been often a matter difficult of determination whether or not various of the powers given to the United States, but not expressly made exclusive, or denied to the States, are so exclusively subject to Federal control that the exercise of them by the States is under no circumstances to be permitted. Shortly stated, the principle that the Supreme Court has laid down for determining this question in each particular case as it has arisen has been the following: As regards generally the powers granted to the National Government there is a difference between those which are of such a character that the exercise of them by the States would be, under any circumstances, inconsistent with the general theory or national polity of the Constitution, and those not of such a character. As regards this latter class, the Supreme Court has held that as long as Congress does not see fit to exercise them, the States may do so. Laws thus passed by the States are, however, of course subject to abrogation at any time by the enactment by Congress of laws governing the same subjects.[38]

In view of the fact that, as to these so-called concurrent powers, State law always must yield to Federal law, when one exists, it is perhaps unfortunate that the term "concurrent" should have come into use, since the word indicates an equality of jurisdiction which does not exist. Indeed, as Justice McLean said in the Passenger cases,[39] as long ago as 1849, "a concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility."

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[37] See Fairbank v. United States (181 U. S. 283).

[38] By the enactment of a Federal law a State law governing the same subject is not nullified but merely suspended during the existence of the Federal statute. Upon the repeal of the Federal statute, the State law again operates without reënactment by the State.

[39] 7 How. 283.

The first appearance of the word "concurrent" in the Constitution itself is in the second section of the Eighteenth Article of Amendment which declares: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Those who framed this section were evidently of the belief that the term had received at the hands of the Supreme Court a clear and precise definition, but the discussions that have arisen since 1919, when the Amendment was ratified, have shown that this was not the case. It is not sufficient, therefore, to content ourselves with the simple statement of the doctrine that has been given above.[40]

In the early case of Sturges v. Crowninshield [41] Chief Justice Marshall, in reference to the matter of bankruptcy, laid down the distinction between the exclusive and concurrent powers of the Federal Government, in the following language: "When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that the mere grant of a power to Congress did not imply a prohibition on the States to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power required that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it."

The principle thus stated by Marshall is a simple and rational one, and has never been departed from by the Supreme Court, though that court has at times varied in its judgment whether the nature of a given power is such as to preclude State action in the absence of congressional regulation.

In Houston v. Moore [42] Justice Johnson said: "The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of those being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the State in which the same shall be, for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish a uniform rule of naturalization (Chirac v. Chirac, 2 Wh. 259), and the delegation of admiralty and maritime jurisdiction (Martin v. Hunter, 1 Wh. 304). In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the Eleventh Amendment of the Constitution, but upon the soundest principles of general reasoning."

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[40] Professor N. T. Dowling, in his article, "Concurrent Power under the Eighteenth Amendment," 6 *Michigan Law Review*, 447, has pointed out ten distinct meanings which it is possible to give to the conception of "concurrent" power.

[41] 4 Wh. 122.

[42] 5 Wh. 1, 49.

In Gibbons v. Ogden,[43] counsel for the State of New York made an elaborate argument in support of the doctrine that the States should be recognized to have a power, concurrent with that of the National Government, to regulate interstate commerce. This, the court denied. However, in Cooley v. Board of Wardens,[44] the court later held that as to matters of pilotage and the like which were local in character and effect, the States might legislate even though interstate commerce might be somewhat affected. The court said: "The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the States."

Still later, in Cardwell v. American River Bridge Co.,[45] the court, after quoting a number of cases, said: "These cases illustrate the general doctrine now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States, and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action."

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[43] 9 Wh. 1.

[44] 12 How. 299.

[45] 113 U. S. 205.

Applying this principle the Supreme Court has held that the States may legislate regarding such matters as pilotage, wharves, harbors, etc.; but may not, even though Congress has not acted, take any steps that, in effect, will operate directly to hinder or regulate the carrying on of interstate commerce itself. "The power of Congress," the court said in Brown v. Houston,[46] "is certainly so far exclusive that no State has power to make any law or regulation which will affect the full and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it hereby indicates its will that that commerce shall be free and untrammeled, and any regulation of the subject by the States is repugnant to such freedom."[47]

Though often spoken of as a matter of concurrent jurisdiction, this authority of the States to legislate with reference to matters primarily of local concern, but which incidentally affect interstate commerce, is not in fact a concurrent jurisdiction as to interstate commerce. Laws passed in pursuance of this jurisdiction derive their authority solely from the powers constitutionally reserved to the States, and the moment they relate directly to interstate commerce they become unconstitutional and void. Thus, State laws and Federal laws regulating interstate commerce may happen to affect the same subjects or persons, but they are as wholly distinct from each other as are State and Federal tax laws which affect the same persons, transactions, or pieces of property.

Within comparatively recent years the Supreme Court has gone considerably further in the expansion of the Federal power to regulate interstate commerce so as to make it encroach seriously upon the field of intrastate commerce the regulation of which had been earlier believed to be reserved exclusively to the States. In effect, the courts have given to the Federal Government authority to regulate intrastate commerce in so far as this is necessary effectively to regulate interstate commerce. There is thus, as to intrastate commerce, and to this extent, a concurrent jurisdiction which, as in other instances when exercised by the Federal Government, supersedes that which may have been exercised by the States. This matter is dealt with more fully in the chapters in which the subject of interstate commerce is considered.

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[46] 114 U. S. 622.

[47] For a full discussion of the concurrent legislative powers of the States with reference to interstate and foreign commerce, see Chapter XXXIX. For a further discussion of concurrent powers with reference to the Federal control of elections, see Chapter XXXIV. See *post*, section 67 for the discussion of the Eighteenth Amendment.

It is often a matter of considerable difficulty to determine in specific cases whether Congress in the regulation of matters which are subject to State control in the absence of congressional regulation, has intended to cover the field so completely as to leave no room for constitutional State action in the premises. This uncertainty, however, has involved, in most instances, only matters of statutory construction, and not the expounding of constitutional principles; and, moreover, the cases in which these doubts have been dealt with will be considered in connection with the discussion of the specific laws involved.

What has been said in the foregoing paragraphs has related to the conception of concurrent powers, not as expressly provided for in the Constitution, but as deduced from the general character of the governmental scheme provided for by it.

§ 67. The Eighteenth Amendment and Concurrent Power.

It has already been mentioned that express provision for concurrent jurisdiction by the States over a matter placed within the regulatory power of Congress occurs for the first and only time in the Constitution in the Eighteenth Amendment. Section 2 of that Amendment provides: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

As is well known the provisions for the Federal enforcement of this Amendment are contained in the so-called Volstead Act of 1919 [48] and the amendments thereto. A considerable number of constitutional questions have arisen under this act and have been adjudicated by the Supreme Court, and some of these are discussed elsewhere in the present volume in connection with the special constitutional questions involved in them.[49] Here will be discussed, in the main, only the light thrown by these decisions upon the matter of concurrency of Federal and State authority.

That the provision of the Volstead Act which declared intoxicating beverages containing as much as one-half of one per cent of alcohol by volume, and therefore within its prohibitions, was constitutional, as a reasonable definition, was declared by the Supreme Court in Jacob Ruppert v. Caffey.[50]

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[48] 41 Stat. at L. 305.

[49] See especially the discussion of "Searches and Seizures."

In a series of cases reported under the style of Rhode Island v. Palmer,[51] were presented three possible constructions to be given to the term 'concurrent power' as used in the Amendment: (1) that, to be enforced, the Amendment would require joint action by Congress and the States, that is, that both would have to act; (2) that the field of enforcement was to be regarded as divided between the National Government and the States along the line of distinction between interstate and intrastate commerce; and (3) that Congress and the State legislatures were empowered to act independently, but, of course, under the condition that State action should not conflict or interfere with that of the National Government.

The court, in its majority opinion, rejected the first two of these constructions, and, apparently, accepted the third, saying: "The words 'concurrent power,' in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

Chief Justice White, in a concurring opinion, rejected also the third construction, upon the ground that, by declaring that, in cases of conflict, the Federal laws should in all cases prevail, the very idea of concurrency of jurisdiction provided for by the Amendment was negated. He said: "As the power of both Congress and the States in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other." Continuing, the Chief Justice declared that the duty was clearly cast upon Congress of defining the prohibited beverages, and also of enacting such regulations and sanctions as would be necessary to make the definition and sanctions operative. Apparently, though upon this point the statement is not quite clear, the position of the Chief Justice was that the States should be held to have authority to enact such measures as they might deem necessary or desirable for rendering effective the definition and sanctions declared by Congress, but that the States should be conceded to have no authority to alter the definition and the sanctions declared by Congress.

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[50] 251 U. S. 264. The court referred to the fact that a survey of the liquor laws of the States revealed that in sixteen States the test as to the beverages to be deemed intoxicating was either a list of enumerated beverages without regard to whether they contained any alcohol, regardless of quantity; that in eighteen States the presence of as much as one-half of one per cent of alcohol by volume was deemed sufficient; that in six States, one per cent of alcohol was sufficient; in one State the test was the presence of the "alcoholic principle"; and in two States, two per cent of alcohol.

[51] 253 U. S. 350, 387, 389. This and the accompanying cases are sometimes cited as the "National Prohibition Cases."

In a dissenting opinion, Justice McKenna [52] declared that Section 2 of the Amendment should be so construed as to require for its enforcement "united action between the States and Congress, or, at any rate, concordant and harmonious action." Apparently, then, according to his view, in cases in which Federal and State regulations conflict, neither should be deemed operative.[53]

In United States v. Lanza,[54] the concurrency of the Federal Government and of the States with regard to liquor legislation was recognized in the holding that the same act might constitute two offences,—one against the laws of the United States in enforcement of the Eighteenth Amendment, and one against a State liquor law which had been enacted prior to the adoption of the Amendment. The court said: "The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions."

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[52] The opinion is a peculiar one, in that only a series of conclusions or propositions is stated, without any reasoning in support of them.

[53] It is of constitutional interest to note the argument of Justice McKenna that prior decisions of the court holding that, when in conflict with Federal laws, State laws passed in exercise by the States of their so-called concurrent powers would have to yield, had been deduced from the fundamental proposition, accepted by the court from the beginning, that the authority of the United States is superior to that of the individual States. "The powers of Congress were not decided to be supreme because they were concurrent with powers in the States, but because of their source, their source being the Constitution of the United States and the laws made in pursuance of the Constitution, or against the source of the powers of the States."

[54] 260 U. S. 377, 381.

It is important to note that, in this case, the court declared that such powers as the States continue to possess since the adoption of the Eighteenth Amendment is theirs, not by reason of, that is, by grant by, the Amendment, but as possessed by them before the adoption of the Amendment, and, therefore, independently of it. The court said: "To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, State power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the ratio decidendi of our decision in Vigliotti v. Pennsylvania, 258 U. S. 403."[55]

There has been considerable discussion as to whether or not the States are under a moral constitutional obligation to lend their affirmative assistance, through their police or other administrative agencies, supplemented if necessary by appropriate legislation, for the effective enforcement of Federal constitutional provisions, as, for example, those contained in the Eighteenth Amendment. The existence of such a moral obligation was denied by Governor Ritchie of Maryland in several public addresses, and asserted by Senator Borah.[56]

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[55] In Vigliotti v. Pennsylvania, the court, with reference to a State liquor law, said: "The Brooks Law as thus construed does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the State supplies in the effort to make prohibition effective. That the State may by appropriate legislation exercise its police power to that end was expressly provided in section 2 of the amendment which declares that 'Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.' "

§ 68. Interaction of Federal and State Jurisdiction: Use by Federal Government of State Agencies for the Enforcement of Their Laws, and Vice Versa.

It is characteristic of the governmental organization of the United States that the National Government is equipped with a complete governmental organization, executive and judicial as well as legislative, for the execution of its own laws; and, similarly, that each of the States is thus equipped. The extent to which, and the manner in which, it is attempted to prevent these governments, State and Federal, from interfering with each other in the exercise of their respective constitutional powers, will be later discussed.[57] Also, in another chapter will be discussed the obligation upon the part of the State courts to give recognition and enforcement, in proper cases, to Federal laws.[58] In general, however, the Federal and State Governments act independently of each other, as regards their executive or administrative services, and the principle is well established that the Federal Government may not impose upon State officials the imperative obligation and burden of executing Federal laws, nor, *a fortiori*, may the States obligate Federal officials to execute State laws.[59] However, it is equally well established that there is no constitutional objection to the granting by the Federal Government to State officials of authority to execute Federal functions, if they, or rather their respective State governments, are willing that they should do so.[60] In fact, there have been a considerable number of instances in which this has been done, some of them dating from the very beginning of the Government. Thus the original Judiciary Act of 1789 authorized State justices of the peace to issue warrants for the arrest of offenders against National laws, and to admit such offenders to bail.[61]

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[56] For Senator Borah's argument, see New York *Times*, July 28, 1929. Governor Ritchie's argument has been published and distributed by the Association Against the Prohibition Amendment.

[57] See chapter VI.

[58] Section 582.

[59] Kentucky v. Dennison (24 How. 66).

[60] Some of the States, by express constitutional provisions, forbid their officials from accepting, while in office, Federal appointments. These prohibitions, however, in general, if not in all cases, are declared to apply only to certain of the higher grades of officers. A violation of these prohibitions operates, *ipso facto*, as a resignation of the State officials. It would seem to be clear that the States cannot prevent anyone, not even their own officers, from accepting a Federal appointment: the most that they can do is to declare that such an acceptance will operate to vacate a State office held by the one accepting the Federal office.

[61] This provision is still in force. See Section 1014 of the Revised Statutes.

In 1793 State magistrates were, by an Act of Congress, authorized to arrest fugitive slaves.[62] Congress early authorized State justices of the peace to issue warrants for the arrest of deserting seamen.[63]

In the absence of express prohibition by the State, the State is presumed to give its consent to the exercise by its officials of Federal functions. This doctrine was declared in Prigg v. Pennsylvania and has been followed in subsequent cases. Use of State officials in the exercise of its right of eminent domain has been made by the Federal Government.[64] The United States Government has also made use of State courts for the granting of naturalization to aliens.[65] The most recent instances in which the United States has availed itself, in some measure, of State officials for the execution of its own laws, is seen in the Selective Draft Laws of 1917 and 1919,[66] and the National Prohibition Act of 1919.[67]

In the Selective Draft cases (Arver v. United States),[68] the court said: "We are of opinion that the contention that the act is void as a delegation of Federal power to State officials because of some of its administrative features is too wanting in merit to require further notice."

§ 69. Appointment of Federal Officials as State Officials and Vice Versa.

There is no provision of the Federal Constitution which prevents Federal officials from holding at the same time State offices, or which prevents persons occupying State offices from appointment to Federal offices. In general, however, it has been deemed inadvisable that, except as to minor offices, persons should hold at the same time both Federal and State appointments.

In 1873 President Grant issued an Executive Order which declared that, whereas it had been brought to his notice that many persons holding Federal office had accepted offices under the authority of States and Territories or of their municipalities, and whereas it was believed that the holding of both Federal and State offices by the same persons and at the same time was incompatible with a due and faithful discharge of the duties of either office, and moreover "not in harmony with the genius of the Government," therefore, public notice was given that, except as to justices of the peace, of notaries public, commissioners of deeds, sheriffs and deputy sheriffs of the States appointed as deputy marshals of the United States, deputy postmasters with salaries not exceeding $600 per annum, the acceptance by Federal officers of State or Territorial offices would be deemed to vacate the Federal offices held by them, and to operate as a resignation from such offices by such Federal officials.[69]

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[62] This provision was upheld in Prigg v. Pennsylvania (16 Pet. 539), the court saying: "As to the authority so conferred upon State magistrates, while a difference of opinion has existed and may exist still on the point in different States, whether State magistrates are bound to act under it, none is entertained by this court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

[63] This provision was upheld in Robertson v. Baldwin (165 U. S. 275). In Dallemagne v. Moisan (197 U. S. 169), it was declared that a State officer might make an arrest of a seaman charged with insubordination on board a foreign vessel, on requisition of the consul of the foreign State to which the vessel belongs, conformably to a provision of a treaty between the United States and the foreign State.

[64] This was upheld in United States v. Jones (109 U. S. 513).

[65] Sustained in Holmgren v. United States (217 U. S. 509).

[66] 40 Stat. at L. 76, 1211.

[67] 41 Stat. at L. 305.

[68] 245 U. S. 366.

By Executive Order of May 8, 1927, President Coolidge declared the Executive Order of President Grant amended by the addition of a paragraph providing that "in order that they may more efficiently function in the enforcement of the National Prohibition Act, any State, county, or municipal officer may be appointed, at a nominal rate of compensation, as prohibition officer of the Treasury Department to enforce the provisions of the National Prohibition Act and acts supplemental thereto, in States and Territories except in those States having constitutional and statutory provisions against State officers holding office under the Federal Government." [70]

This Executive Order by President Coolidge gave rise, at the time, to considerable discussion as to its constitutionality, but there would seem to be no reasonable ground for contesting its validity.[71]

§ 70. Comity between the United States and the States in the Exercise of Their Respective Powers.

It is clear that the existence of a Federal Government with its own functions and jurisdictional powers, on the one hand, and of forty-eight State Governments with their distinctive functions and jurisdictional powers, necessarily creates many administrative inconveniences (not to speak of opportunities for conflicts) which it is impossible to obviate.

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[69] See also Executive Orders of June 26, 1907, and April 14, 1917.

[70] Opportunity for such appointments to the Federal prohibition forces was provided by the Volstead Act (Sec. 38) which authorized the Commissioner of Internal Revenue and the Attorney-General of the United States to appoint and employ such employees as they might deem necessary for the enforcement of the act, and which appropriated a large lump sum for such enforcement. Such lump appropriations have been continued in subsequent acts.

[71] The best discussion of this Order is that of Professor James Hart in his article "Some Legal Questions Growing Out of the Executive Order for Prohibition Enforcement" in 13 *Virginia Law Review*, 86. See also report of the special sub-committee of the Senate Committee on the Judiciary to which this Order was referred for consideration as to its legality.

However, it is possible to reduce these inconveniences to a minimum by means of friendly coöperative action between the Federal and State authorities when this is constitutionally possible [72] and, in general, this has been the spirit in which the American Federal system has been operated. Thus, the State courts have been permitted to retain jurisdiction over various classes of causes which it would have been possible for Congress to vest exclusively in the Federal courts; and, in those cases in which the Federal courts have been given jurisdiction, by reason of the diversity of citizenship of the parties, of cases in which questions of State law are involved, the Federal courts have been directed to conform as near as may be to the practice existing in like causes in the courts of the State in which the Federal court sits.[73] In many other cases, which it is not necessary here to mention, the Federal laws have taken cognizance of, and, to the extent constitutionally possible, have permitted the State laws, though differing among themselves, to continue to operate within their several States.[74]

As another instance of Federal and State comity may be mentioned the established practice according to which, in cases in which both Federal and State courts have jurisdiction over the same person or *res*, that court is permitted to continue to exercise its jurisdiction which first becomes seized of the case.[75]

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[72] The provisions of the National Constitution regarding the rendition of fugitives from justice, that regarding the full faith and credit that shall be given in each State to the public acts, records, and judicial proceedings of the other States (Art. IV, Sec. 1), and that, according to which the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States (Art. IV, Sec. 2), have for their aim the promotion of this comity and coöperation between the several States of the Union.

[73] Revised Statutes, 914. As to the constitutionality of this provision, see Amy v. Watertown (130 U. S. 301). See also Revised Statutes, Secs. 915 and 916.

[74] As to this, see section 71, dealing with the delegation of Federal legislative power to the States.

[75] For a statement of the grounds for this practice, see Covell v. Heyman (111 U. S. 176). In that case the court said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

A recent case which illustrates the friendly coöperation of State and Federal authorities is that of Ponzi v. Fessenden.[76] In this case the plaintiff, while undergoing imprisonment because of conviction in a Federal court of an offence against a Federal law, was, with the permission of the Attorney-General of the United States, produced, upon a writ of habeas corpus from a State court, in a State court and there arraigned, tried, and found guilty of an offence against a law of the State. He filed in a Federal court a petition for a writ of habeas corpus alleging, in substance, that, having been, while imprisoned, within the exclusive jurisdiction of the Federal Government, it had not been constitutional to surrender him into State custody for the purpose of trying him in a State court. The question thus raised having been certified to the Supreme Court, that court held that the action had been constitutional. The language of Chief Justice Taft, in support of this ruling, so admirably states the spirit in which the State and Federal sovereignties should, and constitutionally may, operate, that it deserves to be quoted. He said: "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

"One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. . . . Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it."

In a later chapter will be discussed the doctrine that the Federal and State Governments are not allowed to interfere directly with each other's operations by means of taxation or otherwise, and here needs to be noted only the fact that this doctrine has been based, not upon any expressed provision of the Federal Constitution, but upon the general doctrine of comity and coöperation between the Federal and State authorities.[77]

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[76] 258 U. S. 254.

It may furthermore be pointed out that this doctrine of comity and coöperation may be said to be largely responsible for the recognition of the "concurrent" powers of the States, with reference to the regulation of matters placed expressly within the authority of Congress, but which, in the absence of congressional action, are appropriate for State regulation.[78]

§ 71. Delegation of Federal Powers to the States.[79]

The preceding section has dealt, it will have been observed, with the enforcement by the Federal and State Governments of each other's laws, and not with the transfer by the Federal Government to the States or by the States to the Federal Government, of jurisdiction to legislate. Such a delegation of legislative power is forbidden by the general doctrine that a delegated power may not be delegated,—*delegata potestas non potest delegari.* As applied in the field of American constitutional law this doctrine is defended upon the ground that the sovereign people having declared in the Constitutions adopted by them by what government or governmental organ specified powers are to be exercised, it is not permissible that this declaration should be altered or defeated.

Though the absolute character of this rule has never been weakened by declarations of the courts, its operation has, in a number of instances, been avoided by reasoning which, in some cases, has been very fine, if, indeed, not tinged with sophistry. Thus, in a later chapter, dealing with the Commerce Clause, it will be seen that there have been instances in which Congress has permitted the States to act with regard to matters of interstate commerce which, except for such congressional permission, they would have been constitutionally incompetent to regulate. This has been sanctioned by the courts upon the ground that by such permission Congress did not give to the States a jurisdictional authority which they had not previously possessed, but that it merely removed from the exercise of such jurisdiction the obstacle imposed by the presumption that, in default of such permissive declaration by Congress, it was the desire of that body that there should be no regulation.[80]

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[77] Possibly this is not wholly true as to the unconstitutionality of State interference with Federal operations, since the foundation for this inability may be said to rest also upon the underlying doctrine of the supremacy of Federal over State authority; but certainly the converse doctrine that the Federal Government may not interfere with State operations rests only upon a doctrine of comity and coöperation.

[78] In some cases the silence of Congress has been deemed equivalent to a declaration by that body that there shall be no regulation.

[79] For an excellent discussion of this subject, see the article by Professor James D. Barnett, "The Delegation of Legislative Power by Congress to the States," in 2 *American Political Science Review,* 347.

Elsewhere in the present treatise is discussed the permission given to the States by Congress to tax National banks in certain specified ways. Here, also, it has been held that this is not a delegation of a Federal authority to the States but merely the removal of an obstacle to the exercise by the States of their constitutional powers of taxation.[81]

There have been repeated instances in which Congress has accepted State laws as its own. But this, of course, has not meant that State laws have been recognized to have a force, *ex proprio vigore*, within a field reserved by the Constitution for Federal legislative action. Mention has already been made of provisions of the original Judiciary Act of 1789 with regard to the adoption by the Federal courts of the practices of the courts in the States in which the Federal courts sit.[82] In the same year Congress provided that, until it should make further provision, State laws regarding pilots should remain in force.[83] As to this act, the court, in Gibbons v. Ogden,[84] said: "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." In *Ex parte* Siebold,[85] when it was objected that the Federal courts had no criminal law under which to punish officers of congressional elections who had violated the duties imposed on them by the State laws, the court said that the State laws "were in effect adopted by Congress."

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[80] See James Clark Distilling Co. v. Western Maryland R. Co. (242 U. S. 311). In that case the court said: "It is true the regulation which the Webb-Kenyon Act [of Congress] contains permits State prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of State prohibitions would cease the instant the act of Congress ceased to apply." See also *In re* Rahrer (140 U. S. 545).

[81] Van Allen v. Assessors (3 Wall. 573).

[82] Section 34 of the Judiciary Act of 1789 provided that "the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This was proper and defensible upon the ground that the Federal courts, in such cases, were intended to act for the enforcement of State laws,—that they were given jurisdiction in order to provide impartial tribunals in suits between citizens of different States, and not, primarily at least, to apply Federal law. The exceptions to the foregoing practice are discussed, *post*, in Chapter LXIII.

In Wayman v. Southard (10 Wh. 1), it was held that though Congress had provided, and constitutionally might provide, that the then existing practice and procedure of the State courts should be adopted as the practice and procedure of the Federal courts, it could not be provided by Congress that rules of practice and procedure subsequently adopted by States should be followed by the Federal courts. The Supreme Court said: "if it [Congress] adopts future State laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the State legislatures the power which the Constitution has conferred on Congress."

[83] 1 Stat. at L. 53.

[84] 9 Wh. 1.

[85] 100 U. S. 371.

It has been noted that, in Wayman v. Southard [86] it was held that though Congress might adopt as its own existing laws of the States, it might not do this as to State laws which might thereafter be passed.[87]

In a considerable number of cases Congress, while not adopting State laws as its own, has provided that the operation of its own laws in the several States shall be qualified by the laws of those States. Thus the present National Bankruptcy Act provides that " it shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of filing the petition.[88] The Webb-Kenyon Liquor Law [89] made the Federal prohibition of the interstate transportation of intoxicating liquors depend upon whether such liquors were to be received, possessed, sold, or in any manner used, in violation of any law of the States into which they might be taken.

By a law enacted October 6, 1917,[90] Congress attempted to overcome the decision of the Supreme Court in Southern Pacific Co. v. Jensen [91] by providing that suitors in cases of maritime injuries might claim in the Federal courts the rights and remedies under the workmen's compensation laws of the States. This provision was held unconstitutional by the Supreme Court in Knickerbocker Ice Co. v. Stewart [92] on the ground that admiralty law in the United States had been determined to be wholly and exclusively Federal in character, and that, therefore, Congress could not provide that remedies and rights created by the States could, in admiralty causes, which are exclusively within the jurisdiction of the Federal courts, be given effect to in such courts.[93] The court said: "Considering the fundamental purpose in view and the definite end for which such [admiralty] rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of

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[86] 10 Wh. 1.

[87] Congress has given to the Federal courts a certain amount of discretionary power to modify their practices and procedures so as to bring them into consonance with changed practices and procedures of the courts of the States in which they sit. 17 Stat. at L. 196.

[88] 30 Stat. at L. 544.

[89] 37 Stat. at L. 699.

[90] 40 Stat. at L. 395.

[91] 244 U. S. 205.

[92] 253 U. S. 149, 164.

[93] The so-called "saving clause" of the original judiciary act which saved to suitors in admiralty causes "the right of a common-law remedy where the common law is competent to give it," has, of course, reference to the right of suitors to enforce such common-law remedies in common-law suits (as distinguished from admiralty suits) in the State courts.

Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others." [94]

By Section 301 of the Revenue Act of 1926 [95] it is provided that from the amounts payable to the Federal Government as an inheritance tax may be deducted, up to eighty per cent of such tax, any inheritance tax levied and collected by a State. In Florida v. Mellon [96] this provision was upheld, the court saying: "The contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several States nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax." This is true enough, but the actual operation of the Federal law in this case is, it is seen, made largely dependent upon the laws which may happen to exist in the different States, although it cannot, strictly speaking, be said that Congress has adopted as its own these State laws.

§ 72. State Powers: Curtailment of.

In general it may be said that the States of the Union possess all the constitutional powers not vested by the Federal Constitution in the General Government or not denied to them, expressly or by implication by that instrument. The several States, by their Constitutions, determine the manner in which or the limitations under which these State powers shall be exercised by their several governments or the departments or branches thereof.

As has already been seen from the discussion of the so-called concurrent jurisdiction of the United States and of the States, the extent to which the States may exercise certain of their powers depends upon the extent to which and the manner in which the Federal Congress has legislated. Thus it has happened, that, without any constitutional redistribution of powers, the States, during recent years, have found their fields of constitutionally possible regulation considerably lessened by reason of the legislative activity of the Congress, especially in the exercise of its right to regulate foreign and interstate commerce.

A second manner in which the States of the Union have found their jurisdictions increasingly curtailed has been by a progressive broadening, by constitutional interpretation, of the scope of certain of the Federal powers. Here, too, the Federal power to regulate interstate commerce has been the Federal power especially concerned, as will abundantly appear in the chapters dealing with that subject.[97]

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[94] Justice Holmes dissented, holding that the instant case could be brought within the doctrine of Clark Distilling Co. v. Western Md. R. Co. (242 U. S. 311).

[95] 44 Stat. at L. 69.

[96] 273 U. S. 12, 17.

It must also be confessed that Congress has, upon a number of occasions, exercised its taxing, appropriating, and interstate commerce regulatory powers not for the purpose, principally at least, of raising revenue or controlling interstate trade, but for police purposes with reference to matters that are constitutionally subject to direct regulation only by the States.[98]

Finally, with regard to the increasing subordination of the States to Federal control, may be mentioned the acts of Congress, of which the "Maternity Act" is an instance, and which have been already discussed in connection with the appropriating power of Congress, the substantial effect of which is to induce the States to exercise their reserved constitutional powers in ways, and for purposes, which the Federal Government approves.

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[97] The expanding importance of interstate trade in the economic and industrial life of the United States, as well as a more liberal interpretation of the commerce clause of the Constitution has been responsible for this increase of Federal power at the expense of that of the States.

[98] See, for instance, the act imposing a tax on the issues of State banks; the act of Congress imposing a tax on oleomargarine colored to resemble butter; the act of April 9, 1917, levying a tax on phosphorous matches; the act of August 18, 1917, taxing cotton "futures"; and the Narcotic Act of December 17, 1914. The laws attempting the Federal regulation of child labor, first as a regulation of interstate trade and then as an exercise of the taxing power were held unconstitutional.

CHAPTER V

FEDERAL SUPREMACY

§ 73. Distinction between Confederacy and Federal State.

Two types of governmental organization which especially illustrate the distinction between the possession of sovereignty and the delegation of the exercise of certain governmental powers are the Confederacy and the Federal State.

In a Confederacy a number of sovereign States create by their joint action a central government as their common agent for the exercise of certain powers, which it is to their interest shall be thus exercised. Each State thus coöperating remains a sovereign body-politic, united only by a treaty or other form of compact with the other States, and not only retains all the political powers not granted to the central government, but remains legally free to withdraw at any time from the Confederacy into which it has entered. Strictly speaking, the term Confederate State is thus a misnomer, for no central State exists but only a central Government which acts as the common agent of each of the agreeing States. In a Federal State, upon the other hand, we have a single sovereign political person or entity which vests the exercise of certain of its powers in a central government, and the remaining powers in local governments independent of one another but all acting within their several districts as agents of the central sovereignty, the Federal State. Thus, just as it has been declared to be incorrect to speak of a Confederacy as a State, so here, technically speaking, what exists is a single State, with a governmental machinery consisting of a central organization and a number of local autonomous governing agencies. It is, therefore, more correct to speak of such a State as having a Federal form of governmental organization, than it is to designate it as a Federal State.[1] Whether or not the constitutional units of this federally organized body are entitled to be termed States is a question more important to political theory than it is to constitutional law. Those political philosophers who make sovereignty an essential attribute of statehood are of course obliged to deny to them this title, but the constitutional lawyer is not thus obligated. It is, however, of the utmost importance to the jurist to keep clearly in mind the doctrine that the theory of a divided sovereignty is a false one, and that, conceding the sovereignty of the United States as a National State (regarding which there is now no longer controversy), it necessarily follows that the Central Government and the State governments do not stand over against one another as coördinate powers between whom the powers of public control are divided, but that, fundamentally, the former is supreme, and that, whenever a conflict of authority arises, the final decision and supremacy is with the Federal power itself.

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[1] Despite the fact that as a matter of strict terminology the terms Government and State are to be distinguished, the use of the expressions "National Government" and "Central Government" as synonymous with "United States" as indicating the body-politic possessing the national sovereignty is so common that this usage will be followed in this treatise.

In a Confederacy which is, as we have seen, a league of sovereign States, such coercion as it may be necessary for the central power to apply, may, in certain cases, be directed against the States as such. In a Federal State, however, such as the United States is now agreed to be, the supremacy of the national authority is seldom maintained by direct action against its member Commonwealths, but is exhibited in its authority to execute its will upon all persons subject to its jurisdiction, anything in the Constitution or laws of any State to the contrary notwithstanding, and irrespectively of what may be the opinions and efforts of those exercising the political powers of these States.

The individual States, having a political status only as members of the Union, have not the legal power to place themselves, as political bodies, in opposition to the national will. Their legislatures, their courts or their executive officials may attempt acts unwarranted by the Federal Constitution or Federal law, and they may even command generally that their citizens shall refuse obedience to some specified Federal laws or to the Federal authorities generally, but in all such cases such acts are, legally viewed, simply void, and all individuals obeying them subject to punishment as offenders against national law. The fact that their respective States have directed them to refuse obedience or offer resistance to the execution of the Federal laws can afford them no immunity from punishment, for no one can shelter himself behind an unconstitutional measure which is, in truth, not a law at all, but only an unsuccessful attempt at law.[2]

That the United States of America is to be constitutionally viewed as a Federal State, that is, as a sovereign national body, there is now no doubt, and has not been since the Civil War. In truth, as will presently appear, the Federal Constitution has been construed in accordance with this view from the date of its establishment, though not, it is to be admitted, without protestations upon the part of those who thought that it should have been regarded from the Confederate point of view. These protestations, however, related rather to the question as to the tribunal which, in last resort, should in all cases have the power to determine the validity of claims of rights, privileges or immunities based upon the Federal Constitution, laws or treaties, and not as the supremacy of those Federal laws, treaties and constitutional provisions over State laws and Constitutions. For there has been no escape from the declaration of Art. VI, clause 2, of the Federal Constitution that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

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[2] See for a correct statement of this principle the first annual message of President Lincoln.

This federalistic or nationalistic view of the United States Constitution has been fully compatible with the doctrine that, as implied in its terms and the historical circumstances under which it was adopted, and as expressly declared in the Tenth Amendment, the National Government is to exercise only those powers expressly or by necessary implication granted to it, and the States, through their governments, are to exercise all powers not thus delegated to the United States, or expressly or by necessary implication, denied to them.

This division of governmental powers, or, rather, of the right to exercise them, between the National and State Governments has, since the time when the United States Constitution was adopted, been spoken of as a "division of sovereignty." From what has been said, it is clear that this is, and has always been, a juristically improper, and politically unfortunate description. That it is a juristic error springs from the very nature of sovereignty, and that its implications cannot be realized in practice has been consistently and repeatedly shown since the present Constitution was put into operation. This will abundantly appear throughout the present treatise. The States have never been treated upon a basis of equality with the United States, such as would have resulted from a division of sovereignty,—had such a thing been juristically possible,—but, in every instance, whether with reference to the use of the so-called concurrent powers, or to the many instances in which State and Federal powers have, in their exercise, come into conflict with each other, the States have been obliged to yield to the United States. This supremacy of Federal authority over that of the States has resulted from, and its continued enforcement has demonstrated, the sovereignty of the United States.

The maintenance of this supremacy unimpaired, while at the same time preserving to the States their proper autonomy and independence of action, has, however, been a difficult task; and, so long as the Federal form is retained, this task will continue to tax to the utmost the legal and political abilities of our courts and political bodies. With a quite proper motive those who have controlled the public actions of the States, and those who have guided the activities of the United States, have sought for their respective governments the greatest possible constitutional power and independence, and, therefore, have not hesitated to occupy debatable territory. Thus, without there being any denial of the supremacy of the Federal law, when operating within its proper field, or of the right of the Federal Supreme Court to determine, in final resort, the extent of that proper field, frequent conflicts have resulted. These conflicts in their many and varied forms furnish much of the material for the present treatise, and they will be severally considered in their logical order.[3]

§ 74. Coercion of the States.

In a Confederacy which is, in effect, a league of completely sovereign States, such coercion as it may be necessary for the central power to apply, may, in certain cases, be directed directly against the States as such.

In a Federal State, such as the United States is now agreed to be, the supremacy of the national authority is never maintained by direct action against its member Commonwealths, but is exhibited in its authority to execute its will upon all persons subject to its jurisdiction, anything in the Constitution or laws of any State to the contrary notwithstanding, and irrespective of what may be the opinions and efforts of those exercising the political powers of those States.[4]

The possession by the Federal Government of full power to protect any rights and to enforce any law of its own at any time, and at any place within its territorial limits, any resistance of private individuals, or State officials, acting with or without the authority of State law to the contrary notwithstanding, has been uniformly asserted by the Supreme Court whenever such an assertion has been necessary. Thus, in 1824, in the case of Osborn v. Bank of the United States,[5] Chief Justice Marshall met the argument that the suit, being against one of its officials and based upon acts committed by him in his official capacity, was in fact a suit against the State of Ohio, one, therefore, which, under the Eleventh Amendment, the court was without authority to try, by declaring:

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[3] See the author's *Constitutional Law of the United States*, vol. I, pp. 131–136, where are discussed the leading cases in which, from the beginning, the supremacy of the Federal over State authority was upheld.

[4] However, as to the right of the Federal courts to entertain suits between States and to render judgments against them which may be enforced by writs of execution, see Chapter LXVII, "The Suability of the States." This coercion of the States as such is, however, not so much for the purpose of maintaining the Federal supremacy, as for securing, through Federal agencies, justice as between the States and individual citizens, or between the States themselves.

[5] 9 Wh. 738, 847.

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to all cases perfectly clear in themselves; to cases where the [National] Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law, void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the [National] Government. . . . The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws." That Marshall answered this question in the affirmative need not be said.[6]

In the Debs case,[7] a case growing out of the great railway strike of 1894, the plenitude of the Federal power was emphatically stated. Speaking of the right of the National Government to protect, by armed force if necessary, interstate commerce and the transportation of the mails, the court said: "If all the inhabitants of a State or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the Nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State. But there is no such impotency in the National Government. The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."

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[6] *Cf. Ex parte* Siebold (100 U. S. 371). In United States v. Reese (92 U. S. 214), 1875, the court said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." And in Strauder v. West Virginia (100 U. S. 303), the court said: "A right or an immunity, whether created by the Constitution, or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

[7] *In re* Debs (158 U. S. 564).

In the Minnesota Rate cases[8] the court said: "There is no room in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. . . . The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

The foregoing cases sufficiently illustrate the general principle of the supremacy of the Federal law. The maintenance of this principle, by the exemption of Federal agencies from State interference by taxation, by means of Federal writs of habeas corpus and of injunction to State authorities, and by the removal of suits from State to Federal courts, will be discussed in the next succeeding chapters.

§ 75. State Regulations and Federal Functions.

How jealous the Federal courts are of any State action which in any way interferes with or hinders the free exercise of Federal functions, is shown in the many cases in which have been declared void laws, which, though passed by the States in the exercise of their taxing, police, commercial, and other powers, have been deemed to interfere with the exercise by the United States of its constitutionally granted powers. Many of these cases will be considered later on in connection with the discussion of these specific State powers, but enough of them will be here spoken of to show the general doctrine.

In North Dakota *ex rel.* Flaherty v. Hanson[9] the court held invalid a State law which required that receipts for the payment of the Federal internal revenue tax upon the business of selling intoxicating liquors should be registered and published at the holder's expense. This law was attempted to be defended upon the ground that it was a proper police measure, but the Supreme Court said: "We see no escape from the conclusion that it immediately and directly places a burden upon the lawful taxing power of the United States, or, what is equivalent thereto, places the burden upon the person who pays the United States tax, solely because of the payment of such tax, and wholly without reference to the doing by the person of any act within the State which is subject to the regulating authority of the State. That the attempted exertion of such a power is repugnant to the Constitution of the United States is so elementary as to require nothing but statement." [10]

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[8] Simpson v. Shepard (230 U. S. 352, 399).

[9] 215 U. S. 515.

In United States v. Snyder,[11] the court held that the validity of a lien upon real estate for taxes due the United States under its internal revenue laws could not, by State law, be made dependent upon the recording of such lien in the mortgage records of the State.

In First National Bank in St. Louis v. Missouri,[12] by not wholly satisfactory reasoning, the court held that National banks had not been given by Congress the right to establish branches, and that a State, whose laws forbade the maintenance of branch banks might, by proceedings in the nature of quo warranto, compel the discontinuance of such a branch of a National bank. That the court gave a proper construction of the Federal banking laws is not to be contested, but that the State, and not the Federal Government, should be held competent to apply its law, and to take action in the premises is not so clear.

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[10] With reference to the facts of this case it is to be observed that a long line of decisions had held that the payment of the Federal excise tax did not give to the payor authority to sell liquor—it did not operate as a Federal license. License Tax cases (5 Wall. 462).

[11] 149 U. S. 210.

[12] 263 U. S. 640.

CHAPTER VI

THE MAINTENANCE OF FEDERAL SUPREMACY—THE FREEDOM OF FEDERAL AGENCIES FROM INTERFERENCE OR CONTROL BY THE STATES AND VICE VERSA: FEDERAL EMINENT DOMAIN AND THE STATES

§ 76. State Taxation of Federal Governmental Agencies.

The successful maintenance of a Federal Government, under any circumstances a most difficult task, is an especially difficult one in the United States where Federal functions are exclusively performed by Federal agents and organs, and State functions by State agents and organs. This has necessitated the maintenance of a complete machinery of government for the United States, and, similarly, a complete political organization for each of the member States of the Union. This arrangement carries with it the general doctrine that the States may not in any wise interfere with the operation of a Federal organ or with the exercise by a Federal agent of his official functions; and that, conversely, the Federal Government may not interfere with the operation of a State agency or the official actions of State officials when acting within the constitutional limits reserved to the States. Illustrations of these general principles will appear throughout this treatise. Their scope and significance may, however, be best exhibited in their application to the Federal and State taxing power, and to a discussion of this especial phase of the subject this and the next succeeding paragraphs will be devoted.

That a State may not, in the exercise of its reserved powers, interfere with a Federal governmental agency was settled once for all by the decision of the Supreme Court in McCulloch v. Maryland.[1] This case was all the stronger in that the Federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was an agency neither essential to the National Government nor expressly provided for by the Constitution. The power to establish a National bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and, years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the constitutionality of the bank but had taken the position that, even were it constitutional, she had, under the general power reserved to her of taxing all occupations carried on within her territorial limits, the right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with the operation of a Federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate Federal power. In other words, the State took the ground that, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not properly be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one. In the course of his opinion rendered in this case Marshall, after referring to the fact that the power to tax might be used to destroy, continued: "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other with respect to those very measures is declared supreme over that which exerts the control . . . [is a] proposition not to be denied. . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the customhouse; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . . The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared." [2]

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[1] 4 Wh. 316, 432.

In Osborn v. Bank of the United States,[3] decided in 1824, the question of the power of a State to tax the Bank of the United States was reopened by the State of Ohio, and a strenuous attempt made to have the Supreme Court of the United States modify the views it had expressed in McCulloch v. Maryland. The argument was used that a distinction should be made between the bank as a fiscal agent of the Government and as a private company trading with individuals for its own advantage; and that so far as it existed and operated in this latter capacity it might be taxed and otherwise regulated by the States. The Supreme Court held, however, that in practice the distinction had no existence. "To tax its faculties, its trade, and occupation," it declared, "is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other." Earlier, the opinion said: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. . . . The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments."

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[2] There is ground for holding that the facts of the case of McCulloch v. Maryland did not make it necessary for the court to pass thus broadly upon the principle stated by it. In fact, however, the case has since been relied upon as the leading authority upon that principle.

Marshall also sought to rest the invalidity of Maryland's tax law upon the ground that it exceeded the State's inherent taxing power. It is not necessary, however, at this place, to consider this part of his argument.

[3] 9 Wh. 738.

In Smith v. Kansas City Title and Trust Company [4] the court, with reference to the banks and their bond issues, provided for by the Federal Farm Loan Act of July 17, 1916, said: "Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows."

In First National Bank v. Fellows [5] the court upheld the constitutionality of the authority given to the Federal Reserve Board by the act of December 23, 1913, to grant to National banks applying therefor, and when not in contravention of State or local law, the right to act as trustees, executors, administrators, or registrars of stocks and bonds under such rules and regulations as the Board might prescribe. The State court from which the case had come by writ of error had held that there was no natural connection between the business of banking and the carrying on of Federal fiscal operations upon the one hand, and the settling of estates and acting as trustee of bondholders on the other hand, and, that, therefore, the Federal provision in question was "a direct invasion of the sovereignty of the State which controls not only the devolution of estates of deceased persons and the conducting of private business within the State, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors, and administrators";—in other words, that the case was not covered by the doctrine of McCulloch v. Maryland [6] and Osborn v. Bank of United States.[7] This ruling of the State court, the Supreme Court held unsound, in an opinion which reiterated the constitutional right of Congress to vest in Federal agencies powers which, though considered, in themselves, as private and subject ordinarily to State control, are incidental to the successful discharge by such Federal agencies of their public functions.

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[4] 255 U. S. 180.

[5] 244 U. S. 416.

In Williams v Talladega,[8] it was held that the acceptance by a telegraph company of certain rights provided for by the Federal Act of July 24, 1866, with reference to the construction, maintenance and operation of telegraph lines over the military and post roads of the United States, did not give to the company a Federal franchise or operate to render it a Federal agency so as to prevent a State from levying a license tax upon the company's right to do a local business within the State. After reviewing earlier cases,[9] the court said: "These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders, or from imposing a license tax upon the right to do a local business within the State."[10]

However, in this case the State law was held void upon the ground that there had not been exempted from its operation the sending of United States government messages by the company.[11] This holding was upon the authority of Western Union Teleg. Co. v. Texas,[12] in which the court had said: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. . . . As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and therefore void."

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[6] 4 Wh. 316.

[7] 9 Wh. 738.

[8] 226 U. S. 404.

[9] Postal Teleg. Cable Co. v. Charleston (153 U. S. 692); Western Union Teleg. Co. v. Missouri (190 U. S. 412); Western Union Teleg. Co. v. Richmond (224 U. S. 160).

[10] The constitutional inability of the State to impose a license tax upon the right to do an interstate or foreign commerce business of course arises from the Commerce Clause of the Constitution.

[11] The act of 1866 obligated the company to give priority to all government messages over all other business, and to transmit them at rates annually fixed by the Postmaster General.

§ 77. State Taxation of Property of Concerns Rendering Federal Services.

In McCulloch v. Maryland and Osborn v. Bank of the United States, the State had attempted to levy a tax in the nature of a franchise tax, upon the operations of the Federal bank. In the Maryland case Chief Justice Marshall said: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

This suggestion of Marshall of a power on the part of the States to tax the property of a Federal corporation or agency received judicial application in Thomson v. Union Pacific R. Co.,[13] in which it was held that, in the absence of any legislation of Congress directing otherwise, the property of a railroad company, chartered by a State, but performing Federal services, might be taxed by the State. Chief Justice Chase, speaking for a unanimous court, said: "We think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

In Thomson v. Union Pacific R. Co. the railroad company concerned, although performing Federal services, was chartered by the State. In

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[12] 105 U. S. 460.

[13] 9 Wall. 579.

Union Pacific R. Co. v. Peniston,[14] the same doctrine was applied to a company chartered by Congress. This fact, it was held, did not take the case out of the rule laid down in the earlier case.

§ 78. Principles of Legal and of Economic Incidence Distinguished.

As to instrumentalities or agencies not primarily Federal agencies, but rendering to some extent or in certain respects Federal services, there is applied what may be termed the principle of "economic incidence." That is, a State tax is invalid only when, and in so far as, it imposes an economic burden that may be conceived to hinder the exercise of their Federal functions by such instrumentalities. In the case, however, of instrumentalities that are primarily Federal agencies, and only incidentally exercising other powers, the principle of what may be termed "legal incidence" is applied, namely, that, without regard to its economic effect, the State tax is invalid unless Congress has consented to its imposition. Thus, in Owensboro National Bank v. City of Owensboro [15] it was declared that property of National banks, organized under a Federal statute, is absolutely exempt from State taxation except in so far as Congress has expressly waived this immunity.[16]

In Gromer v. Standard Dredging Co.,[17] it was urged that machinery and tools used in performance of a contract with the United States were agencies of the Federal Government and as such exempt from local taxation. This allegation the court declined to accept.[18]

The doctrine of economic incidence, as will later be seen, is applied generally in the matter of State interference with foreign and interstate commerce.[19]

§ 79. State Taxation of Federal Franchises.

A franchise to be or to act as a corporation granted by a State may be taxed by a State as a piece of intangible property. But franchises or other rights derived from the Federal Government may not be taxed, as such, by the States nor any hindrances placed by the States upon their exercise.[20]

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[14] 18 Wall. 5.

[15] 173 U. S. 664.

[16] See also Davis v. Bank (161 U. S. 275); and National Bank v. Commonwealth (9 Wall. 353).

[17] 224 U. S. 362.

[18] Citing Baltimore Shipbuilding and Dry Dock Co. v. Baltimore (195 U. S. 375) in which it was held that land conveyed by the United States to a corporation for dry dock purposes could not be held an agency of the Federal Government because of a provision for forfeiture under certain conditions to the United States.

[19] See *post*, Chapter LI.

[20] California v. Central Pacific R. Co. (127 U. S. 1).

As will later be seen, the rule is not the same with reference to taxation by the Federal Government of corporate franchises granted by the States.[21] The distinction is this. Congress has power to grant corporate franchises only as means necessary and proper for carrying into effect Federal powers. Therefore, a Federally chartered corporation is necessarily a Federal agency, and, as such, exempt from State control or interference whether by taxation or otherwise. This is not true as regards corporations chartered by the States. They may or may not be State agencies, and, when they are not, they, their property or franchises, are subject to Federal taxation.

§ 80. State Taxation of Patent Rights.

In conformity with the doctrine already stated, it has been held that, while the States may tax the capital employed in the manufacture of copyrighted or patented articles, as well as the tangible property embodied in these articles, they may not exact a fee as a condition precedent to the exercise of these Federally granted rights, nor can they tax the intangible rights themselves as property.[22]

In Patterson v. Kentucky[23] the court held that a State statute regulating the inspection and gauging of oils was a mere police regulation and did not interfere with a patent right under which a certain oil was manufactured. A similar conclusion was reached in Webber v. Virginia.[24] In Allen v. Riley[25] was held valid a State law which required one selling a patent right in any county in the State, to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent, and that any written obligation given for the purchase price of a patent right should contain the words "given for a patent right." These, it was held, were proper police requirements.

Of course no State may, in the exercise of its police or other powers, in any way discriminate against patented articles.[26]

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[21] See Long v. Rockwood (277 U. S. 142). See especially Flint v. Stone Tracy Co. (220 U. S. 107).

[22] Crown Cork and Seal Co. v. Maryland (87 Md. 687); People v. Assessors (156 N. Y. 417); People v. Roberts (159 N. Y. 70). In these cases it is held that if the tax is upon the corporate property generally, or even upon the shares of stock evidencing that property, the value of the patent rights must be deducted. If, however, the tax be upon the shares of stock to the holders, or is upon the franchise of the corporation, the fact that patent rights are included within the assets of the company is not material. *Cf.* Judson, *Taxation*, Sec. 33.

[23] 97 U. S. 501.

[24] 103 U. S. 334.

[25] 203 U. S. 347.

[26] Ozan Lumber Co. v. Union Co. Nat. Bank (145 Fed. 344).

§ 81. State Taxation of Federally Licensed Occupations.

Where, by Federal license, an occupation has been authorized by the United States, enjoyment and employment of the license may not be restrained by a State.[27] Thus in Moran v. New Orleans was held void an ordinance of the city of New Orleans imposing a license tax on certain vessels engaged in foreign commerce and duly enrolled and licensed under act of Congress. The court said: "The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under and which he derives from the constitution and laws of the United States."

§ 82. State Taxation of Federal Salaries.

That the salary or other emoluments of office of Federal officials may not be taxed by the States has not been questioned since the doctrine was first declared in Dobbins v. Commissioners.[28]

§ 83. State Taxation of Federal Property.

The principle that property belonging to the United States is not taxable by the States in which it is situated did not receive final judicial affirmation until 1885 in Van Brocklin v. Tennessee.[29] Prior to this decision it had quite generally been taken for granted that Federal property was thus exempt from State taxation, but in a number of cases Congress would seem to have implied that it was not confident upon this point since it incorporated into enabling acts for the admission of territories into the Union as States, the requirement that after admission the property of the United States should be exempt from State taxation. The effect of the decision in Van Brocklin v. Tennessee was, of course, to hold that these provisions were declaratory merely, and, therefore, superfluous. The fact that the lands concerned in this Tennessee case were acquired by the United States through sales for direct taxes levied by act of Congress and not expressly ceded by the States, was held immaterial.

In Wisconsin C. R. Co. v. Price County [30] the doctrine of Van Brocklin v. Tennessee reappeared and was broadened so as to include taxation not only by the State but by any of its administrative subdivisions.

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[27] Moran v. New Orleans (112 U. S. 69); and Harmon v. Chicago (147 U. S. 396).

[28] 16 Pet. 435.

[29] 117 U. S. 151.

[30] 133 U. S, 496.

§ 84. State Taxation of Federal Securities.

United States securities, it has been held, may not be taxed by the States for the reason that, to admit this power, would give to the State the authority to impair the borrowing power of the National Government. This was early decided in Weston v. Charleston.[31]

In Banks v. The Mayor [32] the attempt to make a distinction between the bonds of the Government issued for loans of money and certificates of indebtedness given in payment for supplies purchased, and to hold the latter subject to taxation by the States, was defeated by the court. So also, in Bank v. Supervisors,[33] United States notes issued under the acts of 1862 and 1863 were held exempt from State taxation.

In Bank of Commerce v. Commissioners [34] stock of the United States constituting a part or the whole of the capital stock of a State bank was held not subject to State taxation, the fact that the tax was on the aggregate of the taxpayer's property and not upon the stock by name being held immaterial. So also in the Bank Tax case [35] a State tax on a valuation equal to the amount of the capital stock paid in, and surplus, of a State bank was held to be a tax on the property of the institution and, therefore, invalid, in so far as that property consisted of stocks of the United States.

In Home Savings Bank v. Des Moines [36] it was held that a State statute directing that shares of stock of State banks should be assessed to such banks, and not to individual shareholders, operated as a tax on the property of the bank and, therefore, in so far as such property represented Federal securities, violated the immunity of such securities from State taxation.

In Farmers and Mechanics Savings Bank v. Minnesota [37] it was held that a State might not tax, as property in the hands of their holders, bonds issued by municipalities in the Indian Territory and the Territory of Oklahoma.

§ 85. State Taxation of State Franchises.

Where a State tax may properly be held to be a franchise tax upon a State institution, it has been held valid, notwithstanding the fact that United States stocks constitute a part of the assets of the institution.[38]

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[31] 2 Pet. 449. See the recent case of Missouri *ex rel.* Missouri Insurance Co. v. Gehner (281 U. S. 313).

[32] 7 Wall. 16.

[33] 7 Wall. 26.

[34] 2 Black, 620.

[35] 2 Wall. 200.

[36] 205 U. S. 503.

[37] 232 U. S. 516.

[38] Society for Savings v. Coite (6 Wall. 594).

So, also, in Home Insurance Co. v. New York [39] it was held that a State statute imposing a tax upon the "corporate franchise or business" of a company, and making reference to its capital stock and dividends only for the purpose of determining the amount of the tax, was not invalid as levying a tax on the capital stock or property of the company, but upon its corporate franchise, and, therefore, not subject to the objection that it imposed a tax on United States securities constituting a portion of the investments of the company. A tax levied upon shares of stock in the hands of their holders, it has been uniformly held, is not equivalent to a tax upon property of the company, or upon its corporate franchise, and, therefore, it has been consistently held that the States may tax the shares of a National bank in the hands of the shareholders, or, similarly, the stock of corporations whose investments consist wholly or in part of Federal securities.[40]

§ 86. Income from Federal Securities Exempt from State Taxation.

Incomes derived from interest on Federal securities, are exempt from State taxation.[41] This was held with reference to the exemption from Federal taxation of incomes derived from State securities, and the same reasoning would of course exclude from State taxation incomes derived from Federal securities.[42]

§ 87. State Taxation of Circulating Notes of National Banks.

Congress, by an act approved August 13, 1894, has provided that "circulating notes of national banking associations and United States legal tender notes, and other notes and certificates of the United States, payable on demand, and circulating or intended to circulate, as currency . . . shall be subject to [State] taxation as money on hand or on deposit." [43]

§ 88. State Inheritance Taxes.

Bequests to the United States may be subjected to State inheritance taxes, such taxes being held to be not upon the property bequeathed. but upon its transmission by will or by descent. "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the State legislature assents to a bequest of it." [44]

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[39] 134 U. S. 594.

[40] Van Allen v. Assessors (3 Wall. 573); Provident Institution v. Massachusetts (6 Wall. 611); Palmer v. McMahon (133 U. S. 660).

[41] Bank of Kentucky v. Com. (9 Bush [Ky.] 46).

[42] Pollock v. Farmers' Loan and Trust Co. (157 U. S. 429). See also the recent case of Macallen Co. v. Massachusetts (279 U. S. 620), in which the entire question as to the lack of constitutional right of the States to tax, under whatever guise, income from Federal securities is reviewed and affirmed.

[43] Hibernia Savings and Loan Society v. San Francisco (200 U. S. 310).

Further, in Plummer v. Coler [45] it was held that the State inheritance tax might be collected upon a bequest consisting of United States bonds issued under an act of Congress specifically declaring them to be exempt from State taxation in any form. After a review of authorities the court said: "We think the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or by descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed." In Murdock v. Ward [46] it was held that a similar bequest of Federal securities was not exempt from the inheritance tax imposed by the War Revenue Act of Congress of 1898.

§ 89. State Taxation of National Banks.

By act of June 3, 1864, certain powers of taxation with reference to National banks were given by Congress to the States. This permission now included within Section 5219 of the Revised Statutes is as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all shares of national banking associations located within the State, subject to only the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital [47] in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

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[44] United States v. Perkins (163 U. S. 625).

[45] 178 U. S. 115.

[46] 178 U. S. 139. For an acute discussion of the distinction between the power of the States in the exercise of their taxing powers, supplemented by their authority to control the transmission or receipt of property in cases of death, and the Federal taxing power not thus supplemented, see the dissenting opinion of Justice White in Snyder v. Bettman (190 U. S. 249).

[47] As to the meaning that has been given by the courts and State legislatures to the phrase "other moneyed capital," see the article by George Bryan in the *Yale Law Journal* for December, 1914.

As has been already pointed out this permission measures the entire extent of the State's power of taxation with reference to the National banks. This Federal act has been construed to operate not as a grant by the United States to the States of a power not previously possessed, but as the removal by Congress of a hindrance to the exercise by the States of a power inherent in them. In Van Allen v. Assessors,[48] the court held that the congressional permission to the States to tax the shares of National banks in the hands of the shareholders is not defeated by the fact that such banks have their capital wholly or in part invested in Federal securities.

The power of the States under Section 5219 to tax property and the shares of stock of National banks of their holders, does not carry with it the authority to levy a tax that will in any wise operate as a tax on the franchise of the banks, that is, their right to be and to do business within the State.

In Owensboro National Bank v. Owensboro [49] the only question held to be open to argument was as to whether, in fact, the State tax involved operated as a tax on the franchise of the bank. That it would be void if it did so operate the court held not open to doubt. In this case, the tax, while not a tax on the franchise in a technical sense, was held to be not upon the shares of stock in the names of the shareholders, but upon all the intangible property of the bank, and, therefore, void.[50]

It has been shown that Section 5219 of the Revised Statutes gave to the States no option as to the mode in which National banks might be taxed. Except for real estate, the States were restricted to an ad valorem tax on the shares of the banks in the hands of the shareholders. In Merchants' National Bank of Richmond v. City of Richmond,[51] known as the "Richmond Case," it was held that a State tax upon bank stock at a higher rate than upon intangible personal property in general, was in violation of Section 5219. This decision led to a movement which resulted in the act of March 4, 1923,[52] which widened the permission given to the States with reference to the taxation of National banks, so that the States might either include the dividends of National banks in taxable income of shareholders where an individual income tax system was in force; or assess the income tax directly against the banks, provided there was no discrimination against them as to rates; or impose an ad valorem tax on the shares of the banks as provided for in the original Section 5219. The act of 1923 somewhat amplified the limitation of the section that "Taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens," so as to make it read: "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of National banks: provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

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[48] 3 Wall. 573.

[49] 173 U. S. 664.

[50] See generally as to State taxation of National Banks the article by Albert S. Bowles, "Some Aspects of National Bank Taxation" in 48 *University of Pennsylvania Law Review*, N. S. 505.

[51] 256 U. S. 635.

[52] 42 Stat. at L. 1499.

By the act of March 25, 1926,[53] the right of the States to tax National banks was still further liberalized by the added option given to the States to impose franchise or other excise taxes measured by "the entire net income received from all sources." This last act also provided that if a State chose to levy a tax on the income as measured by the income of banks, it might also tax individuals, under an individual tax law, upon dividends received by them from National bank shares.[54]

In Smith v. Kansas City Title and Trust Co.[55] the court found no difficulty in declaring the Land banks authorized by the act of July 17, 1916[56] to be fiscal agents of the Federal Government, and, therefore, that the congressional provision that their bonds should be exempt from State as well as Federal taxation was valid.

§ 90. State Taxation of Indian Lands.

In a considerable number of cases the Supreme Court has held immune from State taxation the lands of Indians even after they are held in severalty by them, but with restricted powers of alienation. Among recent cases to this effect are Childers v. Beaver,[57] Jaybird Mining Co. v. Weir,[58] and Shaw v. Gibson-Zahniser Oil Corp.[59]

§ 91. Public Lands of the United States.

The constitutional power of the United States to acquire lands for its own uses by exercise of the right of eminent domain, and of the political authority exercisable over such acquired lands is elsewhere considered in this treatise.[60]

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[53] 44 Stat. at L. 223.

[54] See First National Bank v. Anderson (269 U. S. 341), for a recent general discussion of the status of National banks and of the constitutional and statutory rights of the States to tax them or their stockholders.

[55] 255 U. S. 180.

[56] 39 Stat. at L. 360. Amended by act of January 18, 1918, 40 Stat. at L. 431.

[57] 270 U. S. 555.

[58] 271 U. S. 609.

[59] 276 U. S. 575.

The public lands into which the United States came into possession at the time of the adoption of the Constitution, and those later obtained by various annexations of territory by the United States, belong to the United States in a proprietary as well as a political sense. As Federal property, these are subject to the same control and regulation, with right of lease or alienation by the United States, as is exercisable by private owners of real estate. In addition, being Federal property, they are exempt from control by the States, whether through the exercise of their taxing or other powers.[61]

However, the fact that lands belong to the United States does not necessarily exempt such areas from the exercise over them of the political jurisdictions of the States in which they may be situated.

In Utah Power and Light Co. v. United States [62] the extent of the power of Congress to provide rules and regulations for the use of the public lands of the United States was carefully considered, and the general doctrine relating thereto summed up.

It would appear that the United States has power to restrict, to a certain extent, alienation of public lands after they have been conveyed by the United States in fee simple. Thus, in Ruddy v. Russi [63] it was held not only that the exemption of homestead lands [64] from liability to the satisfaction of any debt contracted prior to the issuing of the patent, extended to debts incurred by a homesteader after obtaining the receiver's final receipt and certificate, but before the patent had actually been issued, but also that the lands might not be sold on execution to satisfy a judgment, obtained after the final patent had issued, upon debts incurred prior to that time, but after the receiver's final receipt and certificate had been obtained.

§ 92. Federal Taxation of State Agencies.

In general, the doctrine is established that the Federal Government may not interfere with the State agencies in the exercise of their rights, just as the States are constitutionally incompetent to interfere with Federal agencies in the exercise of their rights or powers. There are, however, these differences between the two cases. In the first place, as has been already seen, when there is a direct and inescapable conflict between the two jurisdictions, the State authority must yield to the Federal authority. In the second place, the immunity of State agencies from Federal control, whether by way of taxation or otherwise, extends only to such agencies as are essentially governmental in character. These two qualifications upon the immunity of State agencies or State-created corporations from Federal interference will appear in the cases which will be reviewed in the immediately following paragraphs.

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[60] See § 116.

[61] Wisconsin Central R. Co. v. Price County (133 U. S. 496); Pollard v. Hagen (3 How. 212); McGoon v. Scales (9 Wall. 27); United States v. Midwest Oil Co. (236 U. S. 459). See especially this last case with reference to the power of the President by executive order without express congressional authorization, to withdraw public lands from entry or location.

[62] 243 U. S. 389.

[63] 248 U. S. 104.

[64] By U. S. Rev. Stat., Sec. 2296.

In Lane County v. Oregon [65] it was held that the Federal Government was without the power to compel the States to receive in payment of their taxes paper currency that had been declared legal tender by the Federal Government.

In Collector v. Day [66] it held that the Federal Government could not levy an income tax upon the salaries of State officials. In that case the court said: "If the means and instrumentalities employed by that [the General] Government to carry into operation the powers granted to it, are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication."

To the author of the present treatise this decision was not only an unfortunate one from a fiscal point of view, but, constitutionally, an unnecessary one. Throughout the opinion the assumption is implicit that the powers of the National Government and those of the States are upon an equal constitutional plane, so that what can be argued as to the implied limitations upon the one can be argued as to the other; whereas, in fact, as has been earlier pointed out, this is not the fundamental constitutional premise upon which the distribution of powers between the Federal and State Governments is founded. Upon the contrary, since the beginning of the government under the Constitution, and in a great variety of ways, in cases of conflicts of jurisdiction, the United States has been recognized to have a constitutional status superior to that of the States. Thus, instead of supporting the decision in Collector v. Day, as the majority of the court held, the case of McCulloch v. Maryland [67] was in opposition to it; namely, that the States must yield when a Federal right is interposed.[68]

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[65] 7 Wall. 71.

[66] 11 Wall. 113. This case is sometimes styled Buffington v. Day.

In Metcalf v. Mitchell [69] it was held that consulting engineers, advising States and their political subdivisions as to water and sewage projects, were not "employees" of the States or of their subdivisions, whose earnings would be exempt from Federal taxation under the War Revenue Act of Congress of October 13, 1917. In the course of its opinion the court declared that just what instrumentalities of either a State or of the Federal Government may be taxed by the other cannot be stated in terms of universal application. As to the exemption of agencies through which essential governmental functions are directly exercised, there was no doubt, but that as to other agencies or persons there might be doubt.

In Panhandle Oil Co. v. Mississippi [70] it was held that a State might not apply a tax, the amount of which was measured by the amount of gasoline sold to a dealer, in so far as he sold gasoline to the Federal Government for the use of its Coast Guard Fleet or Veterans' Hospital.[71]

In Long v. Rockwood [72] it was held that a State might not tax royalties for the use of patents issued by the United States. This case related to the inclusion of such royalties within incomes subject to the State's income tax law.

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[67] 4 Wh. 316.

[68] Mr. Justice Bradley dissented in Collector v. Day but upon grounds somewhat dissimilar from those indicated in the text, but, none the less, to the author's mind, of a cogent character. He said: "It seems to me that the General Government has the same power of taxing the income of officers of the State Governments as it has of taxing that of its own officers. It is the common government of all alike, and every citizen is presumed to trust his own Government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State Government. I cannot accede to the doctrine that the General Government is to be regarded as in any sense foreign or antagonistic to the State Governments, their officers or people; nor can I agree that a presumption can be admitted that the General Government will act in a manner hostile to the existence or functions of the State Governments, which are constituent parts of the system or body politics forming the basis on which the General Government is founded. The taxation by the State Governments of the instruments employed by the General Government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation."

Mr. Justice Bradley then went on to point out, in a manner that has since proved prophetic, the possible unfortunate consequences that might follow from such a limitation upon the Federal taxing powers as that recognized by the majority of the court.

[69] 269 U. S. 514.

[70] 277 U. S. 218.

[71] Justices Holmes, Brandeis, Stone and McReynolds dissented.

[72] 277 U. S. 142. Query, as to the application of the doctrine of this case to royalties received on publications copyrighted under United States law.

§ 93. Federal Taxation of Properties of the States.

The Supreme Court having, in Collector v. Day, denied to the Federal Government the constitutional right to tax the salaries of State officials, has felt constrained to apply the doctrine in all other cases in which it has been conceived that a direct burden will be laid upon the States, or a possible hindrance to the exercise of their constitutional powers imposed. Thus, in Mercantile National Bank v. New York [73] the court held that the United States might not tax bonds issued by a State, or under its authority, by one of its municipal bodies, and held by private corporations. In Ambrosini v. United States, [74] it held that bonds given to secure the proper enforcement of State laws in respect to the sale of intoxicating liquors, might not be Federally taxed.

In United States v. B. & O. R. Co.[75] it was held that the United States could not collect a tax on money due a municipality of one of the States.

§ 94. Federal Taxation of State Documents, Agencies, and Securities.

In a number of cases in the State courts interesting points have been raised and decided with reference to the obligation imposed by Federal laws to affix stamps to certain documents. There is little doubt that the United States may, in its own courts, or in other ways, refuse to recognize the validity of unstamped documents, but it would seem that it may not dictate to State agencies what instruments they shall accept as valid and enforceable. Though Congress may provide that certain instruments shall be stamped and that, if not so stamped, they shall not be received as evidence in Federal courts, the State cannot be compelled to exclude them as evidence in its courts upon that ground. It has also been held by State courts that the United States may not impose a stamp tax upon judicial processes of State courts, or forbid the recording of unstamped mortgages, or tax the official bonds of State officers.[76]

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[73] 121 U. S. 138.

[74] 187 U. S. 1.

[75] 17 Wall. 322. As to whether the United States may levy import duties upon articles imported from abroad by a State university, or other State instrumentality, see the interesting discussion in the article "When the Importer is a State University, may the Government Collect a Duty?" in *Michigan Law Review*, March, 1929.

[76] Jones v. Keep's Estate (19 Wis. 369); Fifield v. Close (15 Mich. 505); Tucker v. Potter (35 Conn. 43); Moore v. Quirk (105 Mass. 49); Sayles v. Davis (22 Wis. 225); Davis v. Richardson (45 Miss. 499); Garland v. Gaines (73 Conn. 662); 52 L. R. A. 915. *Cf.* Judson *On Taxation*, Sec. 501.

In Thomas v. United States,[77] a Federal tax on the transfer of shares of State-chartered corporations was upheld, as a tax upon business transacted in the exercise of privileges enjoyed under State laws with respect to corporations.

In Nicol v. Ames,[78] the court sustained a Federal tax upon the enjoyment of privileges enjoyed by State incorporated boards of trade.

In *Ex parte* Rapier,[79] it was held that the fact that a lottery company was chartered by a State did not prevent the Federal Government from excluding its tickets from the mails.

In Pollock v. Farmers' Loan and Trust Company,[80] the constitutional impropriety of a Federal tax, which was construed to be a direct tax upon income derived from bonds issued by the political subdivisions or agencies of the States, was declared.[81] However, in Murdock v. Ward,[82] it was held that a Federal inheritance tax might be imposed on legacies or shares consisting of bonds issued under a law providing that they should be exempt from taxation in any form, direct or indirect, Federal, or State. In effect, it was declared that the tax was on the right to inherit and not upon the property inherited.

In Snyder v. Bettman,[83] it was held further that a Federal inheritance tax might be levied upon bequests to a State or a municipal corporation thereof, the tax in question being held to be neither on the property inherited nor on the right to inherit as established by State law, but upon the transmission or receipt of the property bequeathed.[84]

In Greiner v. Lewellyn,[85] it was held that a Federal "estate" tax, imposed by the act of Congress of September 8, 1916, like the earlier legacy or succession tax, was a duty or excise and not a direct tax, and that State or municipal bonds held by a decedent might be included in the net value of the estate upon the transfer of which the estate tax was imposed. "The transfer upon death is taxable," said the court in unqualified terms, "whatsoever the character of the property transferred and to whomsoever the transfer is to be made."

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[77] 192 U. S. 363.

[78] 173 U. S. 509.

[79] 143 U. S. 110.

[80] 157 U. S. 429; 158 U. S. 601.

[81] Citing Buffington v. Day (11 Wall. 115); United States v. B. & O. R. Co. (17 Wall. 322); Van Brocklin v. Anderson (117 U. S. 151); Mercantile National Bank v. New York (121 U. S. 138).

[82] 178 U. S. 139.

[83] 190 U. S. 249.

[84] Reciprocally, it was held in Plummer v. Coler (178 U. S. 115), that a State tax might be collected on legacies consisting of United States bonds,—that the tax was not upon the bonds themselves, but in regulation of the right of bequeathing property by will.

[85] 258 U. S. 384.

§ 95. Effect of Sixteenth Amendment on the Taxing Power of the Federal Government with Respect to State and Municipal Bonds, and Salaries of State Officials.

In 1913 was proclaimed the adoption of the Sixteenth Amendment to the Federal Constitution which provides that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Taken in their literal meaning, and without regard to the circumstances leading up to their adoption, it is clear that the words "from whatever source derived" would give to the Federal Government constitutional power to tax incomes derived from State and municipal bonds. It is known, however, that the purpose of this amendment was to overcome the ruling of the Supreme Court in Pollock v. Farmers' Loan and Trust Co.,[86] which was to the effect that such a tax was, constitutionally speaking, a direct tax, and, as such, would have to be apportioned among the States in proportion to their respective populations, as provided for in Article I, Section 9, Clause 4 of the Constitution. In fact, we find the Supreme Court indicating in a number of cases its opinion that the Amendment should be construed as having only this effect, namely, not to grant any new power of taxation to the Federal Government, but only to relieve it, as to income taxes, from the obligation of apportioning them among the States according to their respective populations.[87]

In none of the cases above referred to in the preceding footnote was there involved the application of the Federal tax law upon State or municipal bonds or the salaries of State officials. In Evans v. Gore,[88] however, these possible subjects of taxation were more nearly approached, there being involved the constitutional power of the Federal Government to tax the salaries of Federal judges. In support of this tax, it was argued that the effect of the words of the Amendment "from whatever sources derived" was to repeal or do away with the provision of Article III, Section 1, of the Constitution that the Federal compensation of Federal judges "shall not be diminished during their continuance in office." The court held that the tax in question would operate as such a diminution, and that the constitutional prohibition as to this was not removed by the Amendment. After reviewing the circumstances leading up to the adoption of the Amendment, the court said: "Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to new or excepted subjects." [89]

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[86] 157 U. S. 429.

[87] Brushaber v. Union Pacific R. Co. (240 U. S. 1); Stanton v. Baltic Mining Co. (240 U. S. 103); Eisner v. Macomber (252 U. S. 189); Peck v. Lowe (247 U. S. 165).

[88] 253 U. S. 245.

§ 96. Federal Taxation of State-granted Franchises.

In Veazie Bank v. Fenno,[90] it was held that the Federal Government in the exercise of its constitutional power to regulate the currency, might tax out of existence the issues of State banks, even though it was conceded that the States have the constitutional power to charter such banks and authorize them to issue notes that will circulate as money. It was argued, in behalf of the bank, that the Federal tax in question was, in effect, a tax on a franchise granted by the State, and, as such, unconstitutional. The court held that, in fact, the tax was not upon the franchise of the bank, but declared, *obiter:* "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

The distinction between a Federally incorporated company, such as a National bank or an interstate transportation company, and a private corporation chartered by a State of the Union, as regards their taxation by the government which has not created them has been earlier referred to.

In South Carolina v. United States,[91] the question was as to the right of the Federal Government to levy internal revenue taxes upon intoxicating liquors sold under a State dispensary system established by the State of South Carolina.

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[89] Justice Holmes dissented upon the ground that the United States was not stopped by Article III, Section 1, from taxing the salaries of its own judicial officers, or, if it was, that that estoppel had been cured by the Sixteenth Amendment. "I do not see," he said, "how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever sources derived."

For an able, but, to the author, not convincing argument that, notwithstanding the authorities that have been cited, it is still possible for the court, when the matter is directly presented to it, to hold that, since the adoption of the Sixteenth Amendment, incomes derived from State and municipal bonds are no longer exempt from Federal taxation, see the article by Prof. E. S. Corwin issued as a Supplement to the *National Municipal Review*, for January, 1924 (vol. XIII, No. I).

[90] 8 Wall. 533.

[91] 199 U. S. 437, 454.

By several statutes the State had assumed the direct control of the wholesale and retail sale of intoxicating liquors within its limits, had established dispensaries, and appointed dispensers therein. The dispensers received fixed salaries, and had therefore no pecuniary interest in the sales, the entire profits therefrom being appropriated by the State, one-half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the State treasury. In previous cases the Supreme Court of the United States had held that the regulation and control of the sale of intoxicating liquors, so far as interstate commerce was not interfered with, was within the legitimate police power of the States, and, indeed, by express congressional statute the States had been permitted to control the sale of imported liquors after their arrival within the States. The question thus was: had the Federal Government the constitutional power to exact taxes from officials appointed and paid by the State of South Carolina and performing functions which the State was constitutionally empowered to intrust to them? The Supreme Court held that, in this particular case, it had. With reference to the argument that was made by South Carolina that for Congress to tax the agents of the State charged with the duty of selling intoxicating liquors, was to interfere with the State's legitimate police power, the court said: "We are not insensible to the force of this argument, and appreciate the difficulties which it presents, but let us see to what it leads. Each State is subject only to the limitations prescribed by the Constitution, and within its territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every State in this Union a republican form of Government.' [92] That expresses the full limit of national control over the internal affairs of a State. The right of South Carolina to control the sale of liquor by the dispensary system has been sustained.[93] The profits from the business in the year 1906, as appears from the findings of fact, were over a half million dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable, other States may follow, and the whole body of internal revenue tax be thus stricken down."

The Supreme Court was not content to rest its judgment upon a premised possibility of serious interference with the revenues of the National Government should the State be permitted, by assuming control of an enterprise, to withdraw it from Federal taxation. Two additional reasons were given why the tax in question should be held valid. In the first place the court noted the fact that the tax "is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom." It is thus, the court said, similar to a succession tax which has been construed to be a tax levied upon and deducted from property before the person to whom it is bequeathed obtains a title thereto. The second and strongest additional reason given by the Supreme Court for holding constitutional the Federal income tax upon the South Carolina dispensaries was that it was not a tax upon the means or instrumentalities employed by the State in discharge of its ordinary functions of government. Upon this point the court adverted to the fact that in the cases in which a Federal tax upon State agencies had been held unconstitutional, it had been levied upon instrumentalities of government. After a review of the cases, the court said: "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

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[92] Art. IV, Sec. 4.

[93] Vance v. Vandercook Co. (170 U. S. 438, 461).

In Flint v. Stone Tracy Co.[94] the right of the United States to levy an excise tax upon the carrying on or doing business by corporations deriving their franchises or charters from the States was again carefully considered, and the conclusion reached that such a Federal tax is constitutional.

§ 97. Federal Power of Eminent Domain in Its Relation to States' Rights.

The right of the Federal Government to use the power of eminent domain is not expressly given to it by the Constitution, but "it results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers." [95] It does not need to be said that the States have the power of eminent domain in the exercise of which they are restrained only by the express or implied limitations of the Federal Constitution.

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[94] 220 U. S. 107.

[95] United States v. Gettysburg Electric Co. (160 U. S. 668). In this case the court upheld the right of Congress to provide for the taking of lands, with due compensation to their owners, for the purpose of preserving and marking with tablets, the battlefield of Gettysburg. "Any act of Congress," said the court, "which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. This proposed use comes within such description." See also Kohl v. United States (91 U. S. 367); Monongahela Navigation Co. v. United States (148 U. S. 312); and Chappell v. United States (160 U. S. 499).

The relation of this power to the requirement of due process of law will be considered elsewhere in this treatise.[96] We shall be here concerned with it only in so far as, in its exercise, the rights of the States and of the United States come into apparent conflict.

That the United States does not require the consent of the States for the taking of property for its own public use is established, and, in fact, has never been seriously contested. In one of the first cases in which the Federal power of eminent domain was discussed,[97] we find the following language used by the court: "The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and of the right of exclusive legislation after the land shall have been acquired."[98] Again in Van Brocklin v. Tennessee,[99] and Fort Leavenworth R. R. Co. v. Lowe[100] the eminent domain power of the Federal Government was again carefully considered.

As in the case of the States, the United States can grant to individuals or to corporations, whether chartered by itself or by the States, the right to exercise the right of eminent domain. Thus, in Cherokee Nation v. Kansas Ry. Co.,[101] an act of Congress was sustained which gave to a State-chartered corporation a right of way through the Indian Territory together with the authority to condemn lands of individual occupants. In Luxton v. North River Bridge Co.[102] the court unanimously upheld the right of Congress to give authority to the bridge company to condemn, for its purposes, lands within the States of New York and New Jersey.

That, in cases of conflict, the power of eminent domain of the States must yield to the constitutionally superior power of eminent domain of the United States is well settled.[103]

A full application of this doctrine of Federal supremacy would seem to justify the taking by the United States for its own use of property belonging to the States. Thus it would appear, from the language used in St. Louis v. Western Union Tel. Co.,[104] that the court seemed to see nothing constitutionally improper in the United States taking for its own use lands owned by the States and devoted in proper form to their own public uses, provided due compensation were made.[105]

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[96] See Chapter LXXXIV.

[97] Kohl v. United States (91 U. S. 367). See also United States v. Fox (94 U. S. 315).

[98] Art. I, Sec. 8: "The Congress shall have power . . . to exercise like [exclusive] authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

[99] 117 U. S. 151.

[100] 114 U. S. 525.

[101] 135 U. S. 641.

[102] 153 U. S. 525.

[103] Cherokee Nation v. Southern Kansas R. Co. (135 U. S. 641).

Even if it should be held, which is unlikely, that property owned and used by the States for their distinctively governmental purposes, is exempt from a taking by the Federal Government for its own uses, it is fairly certain that the courts will justify such a Federal taking of State property which is used for non-political or commercial purposes. In South Carolina v. United States,[106] as has been earlier pointed out, the court held that such State instrumentalities did not enjoy that exemption from Federal taxation which the governmental agencies of the State enjoyed. The same reasons there employed in support of that holding, are sufficient to maintain a similar distinction between the two kinds of agencies or properties with reference to the exercise by the Federal Government of the right of eminent domain.

That the States may not exercise their powers of eminent domain upon property of the United States, even if held only in a proprietary manner and not devoted to a specific public use, has recently been determined by the Supreme Court in Utah Power and Light Co. v. United States.[107]

In United States v. Chandler-Dunbar Water Power Co.[108] it was held that the power of eminent domain had not been improperly exercised when, with reference to land which had been taken for the construction of works that would conserve the flow of a river and therefore promote its navigability, it was also provided that the excess of water power thus obtained might be leased to private parties. The court said: "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State Governments."

In Arlington Hotel Co. v. Fant[109] it was held that the constitutional power of the Federal Government to exercise authority over places purchased by the consent of the legislatures of the States justified the acquisition of land in Arkansas, containing the hot springs and the military hospital, for its exclusive jurisdiction; and that it was immaterial that the springs supplied water sufficient to furnish aid to the indigent and to those of the public of the United States who were able to pay for hotel accommodations on the park surrounding the government hospital.[110]

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[104] 148 U. S. 92.

[105] In this case the court held that the act of Congress under which the company was claiming powers of eminent domain had not given the right to use the streets of a city for its poles, without the consent of the city or State.

[106] 199 U. S. 437.

[107] 243 U. S. 389.

[108] 229 U. S. 53, 73.

[109] 278 U. S. 439.

§ 98. National Parks.

In the course of its opinion in the case last cited, the court said: "Counsel for the plaintiffs in the present case insist that the United States has the constitutional authority to maintain exclusive jurisdiction over the tract here in question as a national park, and that, as the government undoubtedly may use its control over all land within its exclusive jurisdiction to provide national parks, it may, where land is ceded by a state to the exclusive jurisdiction of the national government, treat land thus ceded by the state for such a purpose as it would treat national public land which had never come within the jurisdiction of the state; that as by virtue of article 4 of the Constitution, § 4, Congress has power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, it may treat land ceded to it by a state for the purposes of making a national park exactly as it would treat land which had always been within its exclusive jurisdiction and subject to its disposition for park purposes. This issue may in the future become a subject of constitutional controversy, because some twenty or more parks have been created by Congress, in a number of which exclusive jurisdiction over the land has been conferred by act of cession of the state.

"We do not find it necessary, however, now to examine this question. We think that the history of this Hot Springs National park, as shown by the legislation leading to its establishment and circumstances which the court may judicially notice, is such that the small tract whose jurisdiction is here in question may be brought within the principle of the Lowe Case, and other cases already cited."

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[110] Citing Benson v. United States (146 U. S. 325). See also the recent case of City of Cincinnati v. Vester. 50 Sup. Ct. Reporter, 360.

CHAPTER VII

THE MAINTENANCE OF FEDERAL SUPREMACY BY WRITS OF ERROR [1] FROM THE FEDERAL SUPREME COURT TO STATE COURTS

In a later chapter the organization and jurisdiction of the Federal courts will be considered. In the present and next succeeding chapters, the discussion of these courts and of their jurisdictional powers, will be limited to the matter of the maintenance of Federal supremacy over and against State authority. In the present chapter, the right of the Federal Supreme Court to review, upon appeal or writs of error, the decisions of State courts will be examined.

§ 99. Twenty-fifth Section of the Judiciary Act.

A corollary that follows from the supremacy of Federal law is that when a Federal right, privilege or immunity is set up as a defense or authority for an act, opportunity shall exist for a final determination of this point in the Federal courts. Thus, the original Judiciary Act, passed in the first year of the Constitution, in its famous twenty-fifth section, provided that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision of the suit could be had, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." In order that this appellate jurisdiction might be effectual, this section also provided that, instead of remanding the cause to the State court for a final decision therein, the Supreme Court might, at its discretion, if the cause has been once before remanded, proceed to a final disposition of the same and award execution.

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[1] By act of January 31, 1928, Congress has substituted appeals for writs of errors.

It will be observed that provision for writ of error from the Federal Supreme Court was made only for those cases in which the judgment in the State tribunals was adverse to the alleged Federal right, privilege or immunity. Where the State decision was favorable there was thought to be no need, based upon the principle of Federal supremacy, for a Federal review. In 1916, however, Congress provided that the Supreme Court should have the right to review decisions of State courts which are favorable to alleged Federal rights, privileges and immunities. The jurisdiction thus conferred will be later considered in the chapter dealing generally with the Federal Judiciary and Judicial Power.

The constitutionality of the 25th section of the Judiciary Act was affirmed by the Supreme Court in 1816 in Martin v. Hunter's Lessee.[2] This was a writ of error to the Court of Appeals of the State of Virginia, founded upon a refusal of that court to obey a mandate of the Federal Supreme Court.

The appellate power of the Federal Supreme Court under the twenty-fifth section of the Judiciary Act was again contested in Cohens v. Virginia,[3] decided in 1821, Chief Justice Marshall rendering the opinion of the court. This was a criminal case and the first point made was that a case in which a State appeared as defendant in error was a suit against a State and as such forbidden by the Eleventh Amendment. The court held, however, that this Amendment has reference only to the suits in law or equity commenced or prosecuted against one of the United States by citizens of another State, and not to suits originally begun by a State. "It is, then, the opinion of the court," declared Marshall, "that the defendant who removes a judgment rendered against him by a State court into this court, for the purpose of re-examining the question whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the State."

Secondly, the State renewed its claim that in no case might the appellate jurisdiction of the Supreme Court be constitutionally exercised over the judgment of a State court. To this Marshall replied that the nature of the Federal Union provided by the Constitution and intended by its framers and adopters, required the exercise of the power. "We think," he declared, "that in a government acknowledgely supreme, with respect to objects of vital interest to the Nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessry to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects."

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[2] 1 Wh. 304.

[3] 6 Wh. 264, 412, 414, 415, 422.

To the contention made by the State that to grant the appellate jurisdiction in question would be to render possible a complete consolidation of Federal and State judicial power, Marshall replied: "A complete consolidation of the States so far as respects the judicial power would authorize the legislature to confer on the Federal courts appellate jurisdiction from the State courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few special cases, in the decision of which the Nation takes an interest, is too obvious not to be perceived by all."

CHAPTER VIII

THE MAINTENANCE OF FEDERAL SUPREMACY BY THE REMOVAL OF SUITS FROM STATE TO FEDERAL COURTS

§ 100. Right of Removal.

A corollary which necessarily follows from the doctrine of Federal supremacy is that no State can declare criminal and punish as such acts authorized by Federal law. Since the Civil War this has not been directly denied by the States, but it has been strenuously asserted by them that, when an offence has been committed against their own peace, and the one committing it has been apprehended and brought to trial before their own courts, he is not entitled to have his case removed at once to the Federal courts simply by setting up as a defence that his act was done in pursuance of an authority delegated him by the General Government. The right to set up this defence has not been denied by the States, nor have they claimed that, should the decision of their courts be adverse to him upon this point, he may not take an appeal from their highest tribunals to the Supreme Court of the United States. But they have asserted that when an act has been committed which is criminal by their laws, it is, primarily, an offence against their peace, and as such cognizable only in their own courts, and, therefore, that though, as has been just said, a right of appeal from their highest courts to the United States Supreme Court upon the questions of Federal authority must be allowed, the trial of the offence may not, as a matter of right, be removed by the accused from the State court in which it is begun to one of the lower Federal courts.

These lower Federal courts possess only those powers which have been granted to them by act of Congress. By the original Judiciary Act[1] Congress did not, as it might have done, endow these tribunals with a general jurisdiction in proceedings against Federal officers based upon their official acts. By the famous Force Act of 1833, however, an act passed at the time of South Carolina's attempted nullification of the United States tariff law, it was provided that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, or on account of any act done under color of his office," the case, at the defendant's instance, might be at once removed from the State to the Federal courts for trial.

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[1] 1 Stat. at L. 73.

This act has been from time to time amended, and is now included within Section 33 of the Judicial Code. Its constitutionality was first judicially examined by the Supreme Court in Tennessee v. Davis.[2] In this case Davis, a Federal revenue officer, killed a man, was arrested therefor, and, when brought to trial, applied for removal to a Federal court under this act. The State of Tennessee denied the constitutionality of this grant of right upon the ground that the act for which Davis was being tried was a violation of State and not of Federal law. This the Federal authorities admitted, but asserted that, inasmuch as the defendant was a Federal official, and claimed to have committed the homicide while in pursuance of his duties as such, the Federal courts had the right to assume jurisdiction of the case in order that the independence and supremacy of Federal authority might be maintained. This contention the Supreme Court upheld.

It is seen that Section 33 of the Judicial Code gives the power of removal only with reference to suits against revenue officers of the Federal Government. Section 31, however, provides that "when any civil suit or criminal prosecution is commenced in any State Court for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of, authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State Court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next District Court to be held in the district where it is pending." The constitutionality of this section has been affirmed.[3]

As to all Federal officials other than revenue officers, Federal protection against State action, when necessary, must be sought in cases not covered by Section 641, either by way of writ of error from the highest State court to the Supreme Court of the United States, or, if that be inadequate, by writ of habeas corpus.[4]

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[2] 100 U. S. 257.

[3] Strauder v. West Virginia (100 U. S. 303).

[4] Chapters VII, VIII, IX.

§ 101. Right of Removal in Civil Cases.

The right to remove civil cases begun in State courts into the Federal courts will receive treatment in a later chapter.[5] In these cases the right is given not so much that Federal supremacy may be maintained as that impartial tribunals may be secured to the litigants.

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[5] Chapter VIII.

CHAPTER IX

MAINTENANCE OF FEDERAL SUPREMACY BY HABEAS CORPUS TO STATE AUTHORITIES

§ 102. State Courts May Not Interfere with Federal Authorities.

During the *ante bellum* period the Federal Government often made use of State tribunals and officers for the execution of its laws. Thus, State justices of the peace acted as examining magistrates in criminal cases for the Federal courts, State judges officiated in the execution of extradition treaties with foreign countries, aliens were naturalized in State courts, and State jails and penitentiaries were used for the incarceration of Federal criminals. Both because of this admixture of Federal and State judicial agencies, and because the principle of the absolute independence of the Federal Government from State control was not clearly recognized and admitted, the State courts early assumed the right, by the issuance of writs of habeas corpus, to determine whether a fugitive from justice of a foreign country and fugitive slaves should be surrendered; whether persons in the Federal army were properly held to military service; and even whether persons in the military service of a foreign State should be tried for acts done as belligerents and under the authority of their sovereigns in conformity with the laws of nations.[1]

It was not until 1859 that it was authoritatively established by the United States Supreme Court in the case of Ableman v. Booth [2] that the State courts were without the constitutional power to interfere in any way with the processes of Federal courts, or, in fact, with any agencies of the National Government.[3] Notwithstanding this decision, however, a number of the State courts still claimed and exercised the right to discharge enlisted soldiers and sailors of the United States from the custody of their officers, and this practice was not stopped until 1872 when, in Tarble's case,[4] the Federal Supreme Court held this to be beyond their power.

Here again, as in the Tennessee v. Davis [5] case, the point at issue narrowed itself down to the question whether or not State agencies should be recognized to have a power which might, should the States see fit, be so exercised as seriously to embarrass the National Government in the performance of its constitutional duties. The strict application of the doctrine of a divided sovereignty would have led in both cases to a constitutional *impasse.* But in these as in other cases the Federal Supreme Court compelled the States, in the exercise of their powers, to subordinate themselves to the requirements of national convenience and necessity.

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[1] People v. McLeod (1 Hill, 377). See especially the paper of Seymour D. Thompson before the American Bar Association at its annual meeting in 1884, entitled *Abuses of the Writ of Habeas Corpus.*

[2] 21 How. 506.

[3] See Chap. V.

[4] U. S. v. Tarble (13 Wall. 397).

[5] 100 U. S. 257.

This case settled once for all the principle that a sufficient return to a writ of habeas corpus issued by a State court is the statement that the party is in custody under claim or color of Federal authority derived from either a statute or judicial process.

§ 103. Issuance of the Writ by the Federal Courts.

The power of the Federal courts to issue the writ is purely statutory. This results from the general principle that the courts of the United States have only such jurisdictional powers as are expressly granted to them by the Constitution or by Congress.

The 14th section of the original Judiciary Act of 1789 provided: "That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to persons in gaol, unless where they are in custody under, or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In *Ex parte* Bollman,[6] it was held that the grant of power to issue the writ was an independent one, and not merely as ancillary to and as an aid to the exercise of jurisdiction otherwise obtained.

In Whitney v. Dick,[7] it was held that the silence of the act of March 3, 1891, creating the Circuit Courts of Appeal, on the subject of habeas corpus prevented those courts from issuing the writ except in aid of a jurisdiction already obtained.

It will be observed that the act of 1789 gave to the Federal courts authority to issue the writ only as to persons in jail under or by color of authority of the United States. No provision was made for the release by the Federal courts of persons in custody by order of the authorities of a State.

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[6] 4 Cr. 75.

[7] 202 U. S. 132.

The "Force Act" of 1833 gave to the Federal courts the power to issue writs of habeas corpus "in all cases of a prisoner or prisoners in jail or confinement where he or they shall be committed or confined, on or by any authority or law for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."

In 1842 this authority of the Federal courts was further broadened by the provision that the writ might issue when a subject or citizen of a foreign State, domiciled therein, is in custody because of an act done or omitted under an alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity or effect of which is dependent upon the law of nations.

This act of 1842 grew out of the McLeod case.[8] McLeod, a British subject, was arrested and indicted for murder in New York, alleged to have been committed by him while one of a force of British troops which, during the Canadian rebellion of 1837, made an attack upon the steamer "Caroline" while moored in New York waters. The British Government avowed itself responsible for the act, as a necessary act of war, the steamer being engaged in carrying munitions of war to the Canadian insurgent forces, and demanded of the United States Government McLeod's immediate release. This the Federal Government requested of the New York authorities, but was met with a refusal, and found itself unable to proceed further because of the lack of jurisdiction of the Federal courts to issue the necessary writ of habeas corpus.

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[8] People v. McLeod (1 Hill, 377 and 25 Wend. 483).

The present statutory authority for the issuance of the writ by the Federal courts is contained in the following section of the Revised Statutes:

"Section 751. The Supreme Court and the Circuit [now abolished] and District Courts shall have the power to issue writs of habeas corpus.

"Section 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"Section 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof: or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in its custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

In 1867 the jurisdiction of the Federal courts was still further widened by the provision that the writ might issue "in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any treaty or law of the United States."

It is to be observed that, by statute,[9] the constitutionality of which is established,[10] the Federal courts have been given authority, in order to protect Federal constitutional rights, to employ the writ of habeas corpus for more than a bare legal review such as was its province under the common-law practice and the Act of 31 Car. II, Chap. 2, and to permit, under it, a more searching review of the facts in which the applicant is, or may be, put under his oath to set forth the truth of the facts regarding the causes of his detention, and a disposition of the party by the Federal courts "as law and justice require." Thus, in the cases in which the prisoner is in custody pursuant to a final judgment of a State court, the Federal court, upon habeas corpus, where denial of a Federal constitutional right is alleged, may make inquiry into the truth and substance of the causes of the petitioner's detention, even though, in order to do so, it is necessary to go behind and beyond the record of his conviction in order to determine whether the State court had jurisdiction to render judgment against him.[11]

Armed with the authority thus given, especially by the act of 1867, the Federal courts have repeatedly taken from the custody of the States persons charged therein with offences against State law. Even the lowest of the Federal courts have not hesitated to exercise the power as to persons held for trial before the highest courts of the States.

In the case of Thomas v. Loney [12] the Supreme Court sustained the action of the lower Federal court in releasing from custody by habeas corpus a prisoner who had been arrested by State authority for alleged perjury committed before a notary public of the State in the case of a contested election of a member of the House of Representatives of the United States. "The power of punishing a witness," said the Supreme Court, "for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the Nation that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the State courts."

The leading case, however, and, in some respects, the most extreme, in upholding the power of the Federal courts in the matter of the issuance of writs of habeas corpus to State authorities is that of *Re* Neagle.[13] In that case it was held that, without express statutory authorization, the general authority of the President to see that the laws of the Union be faithfully executed empowered him to appoint a deputy marshal to protect a Federal judge whose life was threatened; and that upon such deputy being arrested and brought to trial in a State court upon the charge of murder for a homicide committed while acting within the line of the duty thus assigned him, he was entitled to release on habeas corpus issued by a Federal judge. This case will be later more fully discussed in connection with the constitutional powers of the President.

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[9] Rev. Stat., Secs. 754–761.

[10] See statement of the court in Frank v. Mangum (237 U. S. 309) at p. 330.

[11] *Re* Cuddy (131 U. S. 280); *Re* Mayfield (141 U. S. 107); Whitten v. Tomlinson (160 U. S. 231); *Re* Watts (190 U. S. 1); Frank v. Mangum (237 U. S. 309).

[12] 134 U. S. 372.

§ 104. Writ Issued Only when Imperative.

The Supreme Court of the United States, though uniformly affirming the doctrine that the Federal courts have power, by writ of habeas corpus, to inquire into the cause of the restraint of the liberty of any person by a State when the justification of Federal authorization or immunity is set up for the act complained of, has, however, repeatedly, and of recent years with increasing emphasis, laid down the doctrine that the Federal courts should not, except in cases of peculiar urgency, exercise that power, but should leave such persons to pursue their remedy by appeal to the Federal Supreme Court, after the adjudication of their cases in the States' highest courts.[14]

It is apparent that, in the issuance of the writ, a distinction is made between those cases in which its issuance is necessary to protect the General Government in the execution of its functions, and those in which the question is merely one of the petitioner's right to liberty. In this latter class of cases, the court said in the Royall case: "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made." The Federal courts, the opinion went on to declare, are to assume that the State courts will neither do injustice nor disregard the settled principles of Federal constitutional law. If, however, they should do so, the petitioner still has the privilege of taking his case by writ of error from the highest State court to the Supreme Court of the United States.[15]

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[13] 135 U. S. 1.

[14] *Ex parte* Royall (117 U. S. 241).

[15] For later refusals of the Federal courts to issue the writ of habeas corpus to persons in the custody of State courts in alleged violation of the Constitution, see Tinsley v. Anderson (171 U. S. 101); and United States *ex rel.* Drury v. Lewis (200 U. S. 1). In the first of those cases the Supreme Court reversed the judgment of the lower court, and dismissed the writ of habeas corpus which it had issued, and re-

The act of 1867 provides that, upon return of the writ of habeas corpus, "the court or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."[16]

It would not appear to be certainly settled just what are the facts to be determined and just what action is to be taken by the Federal court in all cases where the party suing out the writ claims that the act charged against him in the State court was done under the authority of the United States or in pursuance of a process of its courts. When, by means of the writ, the Federal court has brought the accused under its control, is it its duty in all cases to determine whether the accused was an officer of the United States and further whether he had acted in good faith, and within the scope of his Federal authority, and therefore entitled to a discharge; and, if not, to impose such penalty as the law and facts require? Or, where the question is not as to the Federal authority which is set up, but as to whether in fact that authority was overstepped, and there is conflicting evidence as to this, is it the duty of the Federal court to remand the party to the State court for the determination of the question?

The opinions in Ableman v. Booth[17] and Tarble's case,[18] and the reasoning of the court in Tennessee v. Davis,[19] seemed to indicate that the former action is the correct one, namely, that the Federal court should not remand the accused to the State court, but itself determine the fact whether he has acted in excess of his Federal authority. In United States *ex rel.* Drury v. Lewis,[20] however, the court accepted the alternative doctrine, and remanded the accused for trial to the State court, the evidence being conflicting as to whether or not he had in fact exceeded his Federal authority.

The court, quoting from Baker v. Grice[21] said: "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas

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manded the accused to the custody of the State authorities. In *Ex parte* Wood (155 Fed. 190), decided in 1907, habeas corpus was granted by a Federal court for the release of one who was charged in a State court with a violation of a State law, the enforcement of which had previously been enjoined by a Federal court because unconstitutional.

[16] Rev. Stat., Sec. 761.

[17] 21 How. 506.

[18] 13 Wall. 397.

[19] 100 U. S. 257.

[20] 200 U. S. 1.

[21] 169 U. S. 284.

corpus, be taken out of the custody of the officers of the State, and finally discharged therefrom, and thus a trial by the State courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued." [22] In the instant case, however, the court found that there were not present the exceptional circumstances justifying this Federal intervention, and that the evidence was conflicting as to whether the act charged was done in performance of a Federal authority. This being so, the court declared that it was the proper province of the State court and not of the Federal tribunal to determine this question.

The court in this case, in the position which it assumed, cited no prior cases exactly in point. It did indeed refer to earlier adjudications, but none of these had reference to instances in which persons in custody of State authorities had sought release upon the claim that the acts charged against them were done in the course of official duty. In each instance the petitioners based their claim to release upon the ground that the imprisonment by the State authorities was in violation of their individual rights under the Constitution, laws or treaties of the United States. In such cases there was of course no reason, based upon Federal governmental supremacy and efficiency, why the Federal courts should not, in their discretion, leave the petitioners to set up such defence as they might have in the State courts, and on writ of error therefrom to the Federal Supreme Court.[23]

Upon habeas corpus the Federal courts may release from State custody after as well as before conviction in a State court.[24]

Not infrequently the Supreme Court has issued to State authorities a rule to show cause why the writ of habeas corpus should not issue, instead of at once issuing the writ. Such a rule having been issued and return made, the court, in *Ex parte* Yarbrough,[25] said: "As this return is precisely the same that the superintendent [of the State penitentiary] would make if the writ of habeas corpus had been served on him, the court here can determine the right of the prisoners to be released on this rule to show cause, as correctly and with more convenience in the administration of justice, than if the prisoners were present under the writ in the custody of the superintendent; and such is the practice of this court." [26]

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[22] Citing *Re* Loney (134 U. S. 372); *Re* Neagle (135 U. S. 1).

[23] The law regarding the jurisdiction of the State courts over Federal officers is discussed in a valuable article by Mr. James L. Bishop in the *Columbia Law Review* for May, 1909, entitled "The Jurisdiction of State and Federal Courts over Federal Officers." Mr. Bishop suggests that the maintenance of the freedom of Federal authority from State interference, and at the same time the preservation of the proper powers of the State courts could be secured by extending the right of removal of cases from the State to Federal courts, now given under Section 643 of the Revised Statutes to Federal revenue officers, to all officers acting under authority of the United States; and that the issuance of the writ of habeas corpus by Federal courts be limited so as to be merely ancillary to such right of removal.

[24] Hunter v. Wood (209 U. S. 205).

[25] 110 U. S. 651.

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[26] Judge John C. Rose, commenting upon this practice, in his *Jurisdiction and Procedure of the Federal Courts* (2d ed., p. 389) says: "This method of procedure is obviously more convenient when, as often happens, the court is sitting at some considerable distance from the place at which the prisoner is confined. Moreover, when the petitioner is in the custody of State officials, it is more courteous to the State to lay such a rule than to issue the writ in the first instance."

CHAPTER X

THE MAINTENANCE OF FEDERAL SUPREMACY; THE INDEPENDENCE OF FEDERAL COURTS FROM STATE INTERFERENCE

§ 105. Independence of Federal Authorities.

A Federal court having assumed jurisdiction over a person or piece of property, the State authorities are excluded from any interference therewith or from in any way assuming jurisdiction in the premises. This principle was violated by the authorities of the State of Wisconsin in the case of Ableman v. Booth[1] in annulling the proceedings of a commissioner of the United States and discharging a prisoner who had been committed by the commissioner for an offence against a Federal law. The Supreme Court of the United States declared: " The [State] court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further."

That a State court has no power to issue a mandamus or writ of certiorari to a Federal officer is not questioned.[2]

The inability of the State courts by injunction or otherwise to control proceedings in Federal courts is declared in Weber v. Lee Co.,[3] United States v. Keokuk,[4] and Supervisors v. United States.[5] This inability arises not so much from the supremacy of the Federal courts as because the State and Federal judicial systems are independent of one another. In Weber v. Lee Co. the court said: "State courts cannot enjoin the process of proceedings in the circuit [Federal] courts; not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action." The same reason is given in United States v. Keokuk.

§ 106. Injunctions from Federal to State Courts.

It is, however, not quite correct to say that the two judicial systems are "entirely independent in their sphere of action." It is a fact that the

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[1] 21 How. 506.

[2] M'Clung v. Silliman (6 Wh. 598); Kendall v. United States (12 Pet. 524); United States v. Schurz (102 U. S. 378).

[3] 6 Wall. 210. [4] 6 Wall. 514. [5] 9 Wall. 415.

State courts are wholly without power in any way to control the operations of the Federal courts, but the reverse is not true. As has already appeared, a writ of error lies in certain cases from the Federal Supreme Court to the State courts, and, when removal of a case is sought, the Federal courts may issue a writ of certiorari to the State court demanding a copy of the record, and the clerk of the State court refusing compliance with this demand becomes, under an act of Congress, liable to fine or imprisonment. Furthermore the Federal courts possess the right to protect their own jurisdictional rights or the rights of parties to suits before them by restraining orders forbidding proceedings in the State courts.

It is true that, actuated by a desire to preserve so far as possible the independence of the State judiciaries, Congress, by act of 1793, provided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." [6] However, since the decision of the court in French v. Hay,[7] in 1875, the Federal courts have not hesitated to enjoin parties from proceeding in State courts where it has been deemed necessary to preserve their own jurisdictional rights, or to protect individuals in the enjoyment of their Federal rights.[8] Prior to 1875 when the same matter was sought to be litigated in both a State and a Federal court the uniform practice had been for the court which had first gained jurisdiction to exhibit this fact in the other court with the request that that court stay its proceedings therein.

§ 107. Federal Injunctions to Restrain State Officials from Executing Unconstitutional Laws.

The circumstances under which the Federal courts will issue injunctions restraining State officials from enforcing, or bringing suits in the State courts to enforce a State act which is alleged to be in contravention of the Federal Constitution will be further considered in the chapter in which the suability of the State is discussed.

§ 108. Federal Mandamus to State Officials.

The Federal courts may not constitutionally be given jurisdiction to issue writs of mandamus to compel the performance by State officials of State duties.[9] The constitutional power of Congress to authorize the Federal courts, by writs of mandamus, to compel the performance, whether by State or Federal officials, of acts required in order that Federal constitutional rights may be protected, would seem to be beyond question, though Congress has not yet seen fit to grant to these courts the power except as ancillary to jurisdiction already otherwise obtained.[10] It is to be remembered, however, that Congress cannot, without the consent of the State, impose upon its functionaries the performance of Federal duties. Where, however, the act ordered is one unconnected with his official State duties, the fact that an individual is a State functionary would not exempt him from the mandatory power of the Federal courts.

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[6] This section, as later amended so as to exclude from its operation proceedings in bankruptcy, now constitutes Section 720 of the Revised Statutes.

[7] 22 Wall. 250. See also Rickey Land and Cattle Co. v. Miller (218 U. S. 258), and other cases cited in a note in 28 *Yale Law Journal*, 503.

[8] It is to be observed that the injunction is not directed to the State courts, but to the parties restraining them from proceeding in the State courts.

[9] Prigg v. Pennsylvania (16 Pet. 539).

§ 109. State Restrictions upon the Right of Removal of Suits from State to Federal Courts.

By various acts of Congress the right has been granted to defendants to remove into Federal courts civil actions begun in State courts, where there is a diversity of citizenship of the parties. This right, which will be more fully discussed in another chapter,[11] is granted, not in order that Federal supremacy may be maintained, but in order that an impartial tribunal may be secured for the hearing of suits to which citizens of different States are parties. One important question, however, with regard to this right of removal does involve the matter of Federal supremacy, and needs, therefore, to be discussed at this point.

§ 110. Power of the States to Prevent Foreign Corporations Invoking Federal Jurisdiction.

Foreign corporations, so far as they are engaged in interstate or foreign commerce, have a Federal right to enter the States in order to carry on such commerce; and all corporations chartered by one State and doing business in other States, have the constitutional right, when sued by the corporations or citizens of those States, to have the suits removed into the Federal courts. These rights are elsewhere discussed in detail. The question here to be discussed is as to the constitutional right of the States, into which the corporations of other States desire to enter and carry on their business, to require, as a condition precedent to such entry or to a continuance of their business in the States after entry, that such corporations will agree not to exercise, or, in fact, will not exercise, their Federal right of removal. Here it is apparent that the question is not so much the right of a State to interfere with the exercise by a Federal court of its jurisdiction when obtained, as it is to prevent such jurisdiction from being invoked.

The attitude of the Supreme Court with reference to this matter has not, at all times, been the same.[12] The present doctrine would seem to be that stated in Terral v. Burke Construction Co.[13] in which it was held that a State law was invalid which provided for the revocation of the license of a foreign corporation to do business within the State when it should remove a suit into a Federal court. In its opinion the court frankly admitted that the earlier cases dealing with the constitutional point at issue could not be reconciled, and then went on to declare the doctrine established by the more recent decision to be: "that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether State or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to Federal courts in another; that State action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."[14]

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[10] U. S. v. Circuit Court (126 Fed. Rep. 169).

[11] Chapter VIII.

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[12] For earlier positions of the court see Doyle v. Continental Ins. Co. (94 U. S. 535), and Security Mutual Life Ins. Co. v. Prewitt (202 U. S. 246).

[13] 257 U. S. 529, 532, 533.

[14] It followed, the court continued, that the cases of Doyle v. Continental Ins. Co. and Security Mutual Life Ins. Co. v. Prewitt were to be considered as overruled, and the views of the minority justices in those cases to have become the law of the court.

For later cases, see Frost v. Railroad Commission (271 U. S. 583), and Hanover Fire Ins. Co. v. Carr (272 U. S. 494).

CHAPTER XI

THE FEDERAL CONTROL OF THE FORM OF STATE GOVERNMENTS

§ 111. State Autonomy.

In the foregoing pages the sovereignty of the United States as opposed to, and inconsistent with, the continued sovereignty of its individual commonwealth members has been sufficiently declared. Whatever doubt there may have been upon this point before the Civil War, the result of that gigantic struggle left no room for disagreement since, and the subsequent unequivocal assertions of the Federal courts simply registered conclusions that no one could rationally question. Starting, then, from this fundamental fact that, looking at the matter from a purely legal viewpoint, the individual Commonwealths constitute self-governing but politically subordinate portions of the United States, we shall now proceed to consider the degree of autonomy secured them under the Federal Constitution. This subject we may conveniently divide into two parts. First, the examination of the degree of control that the Federal Government may constitutionally exercise over the forms of government that the several States may establish for themselves; and, secondly, the consideration of the extent to which the General Government may supervise or control the exercise by the States of those powers that are reserved to them. First, then, as to the control that may be constitutionally exercised by the United States over the forms of government of its constituent units.

Speaking generally, it may be said that, providing its government be republican in form, each State of the Union may establish such governmental organs as it sees fit, and apportion among them its executive, legislative and judicial powers according to its own judgment as to what is expedient and proper.

§ 112. Republican Form of Government Defined.

The Federal Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." [1]

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[1] Art. IV, Sec. 4.

In form, the first clause of this section would appear to be for the benefit of the States and to impose a duty upon the Federal Government, and such undoubtedly would be its effect should a foreign power attempt to impose a government of any sort whatever upon the people of one of the States against their will; or should a domestic revolution result in the establishment of a government not sanctioned by law or not freely agreed to by the electorate. In fact, however, as is elsewhere described, and as will presently be more particularly spoken of, this clause was so interpreted during reconstruction times as to give to the Federal Government for several years an almost unlimited power of control of the domestic affairs of those States that had been in rebellion against its authority.

It will be noticed that the Constitution does not itself define the term "republican form of government." It has, however, always been an accepted rule of construction that the technical and special terms used in the Constitution are to be given that meaning which they had at the time that instrument was framed. This is but reasonable, for, in default of anything to the contrary, those who drafted the Constitution are to be presumed to have intended the words which they used to have that meaning they knew them to have. For a definition, then, of "republican government" we must discover what, in 1787, such a political form was considered to be. Certainly we may say that the governments of the thirteen original States as they existed at the time the Constitution was drafted must have been considered as illustrating the republican type. Furthermore, the Constitutions of all those States which have been admitted to the Union since 1787 must be regarded as having been impliedly considered republican by Congress at the time of the giving of its assent to their entrance into the Union.

The late Judge Cooley, in his *Principles of Constitutional Law*,[2] has perhaps defined the term as satisfactorily as anyone. "By a republican form of government," he says, "is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy, in which the people or community as an organized whole wield sovereign powers of government, and, on the other, with the rule of one man as King, Emperor, Czar, or Sultan, or with that of one class of men, as an aristocracy. In strictness," Judge Cooley goes on to say, "a republican government is by no means inconsistent with monarchical forms, for a King may be merely an hereditary or elective executive while the powers of legislation are left exclusively to a representative body freely chosen by the people. It is to be observed, however, that it is a republican form of government that is to be guaranteed; and in the light of the undoubted fact that by the Revolution it was expected and intended to throw off monarchical and aristocratic forms, there can be no question but that by a republican form of government was intended a government in which not only would the people's representatives make the laws, and their agents administer them, but the people would also, directly or indirectly, choose the executive. But it would by no means follow that the whole body of people, or even the whole body of adult and competent persons, would be admitted to political privileges; and in any republican State the law must determine the qualifications for admission to the elective franchise."

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[2] Chapter XI.

In Duncan v. McCall,[3] Chief Justice Fuller was led to give a definition of a government republican in form by reason of the contention of the plaintiff in error that the State courts in the trial of criminal charges against him had applied laws that had not, in fact, been enacted by the State, and that, as a result, the government of the State, *quoad hoc*, was not republican in form. The Chief Justice said: "This is not the case of a system of laws attacked upon the ground of their invalidity as the product of revolution. By the Constitution a republican form of government is guaranteed to every State in the union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majority."

In South Carolina v. United States,[3a] a case decided in 1905, an *obiter* suggestion was made by the court in its majority opinion that a State by assuming the control of the manufacture and distribution of certain commodities, and, especially, by acquiring and undertaking the management of public utilities might thereby lose its republican form of government. To the suggestions thus made no weight can be given. Whether or not a government is republican in form depends not upon the sphere of its activities, but upon the manner in which its functionaries are selected, and the degree of their legal responsibility to the people. Thus there would be no difficulty in the most socialistic of States having a government of the purest republican type.[3b]

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[3] 139 U. S. 449.

[3a] 199 U. S. 437.

[3b] For a general discussion of what constitutes a government republican in form, see Luther v. Borden (7 How. 1); a case growing out of Dorr's Rebellion in 1845 in Rhode Island. The argument of Daniel Webster who was of counsel is especially

§ 113. State Initiative and Referendum Laws.

There have been some decisions of State courts that general or state-wide initiative or referendum laws or State constitutional provisions providing for the exercise of such legislative powers upon the part of the electorate are in violation of the Federal Constitution in that their effect is to substitute, *pro tanto*, direct democratic, for republican or representative, government. This was held, in 1847, in Rice v. Foster [4] in later cases, however, the State courts have found little difficulty in harmonizing the initiative and the referendum with the concept of a republican form of government.[5]

The courts of Missouri and Oklahoma have repeatedly upheld the initiative and referendum provisions of their respective State Constitutions.

§ 114. State Initiative and Referendum Provisions before the Supreme Court.

In Pacific States Telephone and Telegraph Co. v. Oregon,[6] decided in 1912, the attempt was made to obtain from the Federal Supreme Court a determination as to the compatibility of State initiative and referendum provisions with the requirements of a government republican in form, but the Supreme Court declared that the question, as raised, was a political one and, therefore, not a proper one for discussion by the court.

In Marshall v. Dye,[7] the submission of a proposed new Constitution for the State of Indiana to the vote of the electorate had been prevented by an injunction issued by a State court upon the ground that the statute providing for the submission was unconstitutional as tested by the then existing State Constitution. This action of the lower court was affirmed by the Supreme Court of the State, whereupon the case was taken by writ of error to the Federal Supreme Court. It was contended that this refusal upon the part of the State courts to permit the people to express their constituent will was, in effect, to destroy republican government in and over the State. The Supreme Court dismissed this contention with the statement that the full treatment of the subject in Pacific States

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valuable. The use of this guaranty clause by the United States for the "reconstruction" of the Southern States after the Civil War is discussed in the author's *Constitutional Law*, § 122. A limited suffrage is compatible with a republican form of government. Minor v. Happersett (21 Wall. 162).

[4] 4 Harr. 479, to the same effect see the holding in Parker v. Commonwealth (6 Pa. 507).

[5] *Cf.* Kadderly v. Portland (74 Pac. 719). For a discussion of initiative and referendum statutory provisions as related to the principle that constitutionally delegated legislative powers may not be delegated, see *post*, § 745.

[6] 223 U. S. 118.

[7] 231 U. S. 250.

Telephone and Telegraph Co. v. Oregon made unnecessary a further argument as to the non-justiciable character of the issue raised.

In Ohio v. Hildebrant,[8] the attempt was again made, but without success, to obtain from the Federal Supreme Court a ruling as to whether a State government was republican in form. By the Constitution of the State adopted in 1912, the legislative power had been expressly vested not only in the Senate and House of Representatives of the State, but in the people in whom a right was reserved to approve or disapprove by popular vote any law enacted by the General Assembly. The contention that this was in violation of Article IV, Section 4, of the Federal Constitution "must rest," said the court, "upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a State where such condition exists to be not republican in form." This proposition, and the argument in support of it, said the court, disregards "the settled rule that the question of whether that guarantee of the [Federal] Constitution has been disregarded presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution."

§ 115. Federal Authority with Reference to Contesting State Governments.

Precedents have established the principle that where there is a dispute in a State as to the *de jure* character of a particular organ of its government, as, for example, as to which of two individuals has been elected as chief executive, or which of two courts or legislatures is entitled to authority, the Federal Government will not ordinarily interfere, being governed by the principle that each State government has a tribunal for the decision of such contests, and that the General Government will consider itself bound by the decision which that tribunal renders, just as the Federal courts hold themselves bound by the decisions of the State courts as to the existence and, in general, the interpretation of their respective State statutes.

In two classes of cases, however, the Federal Government exercises the right to decide which of two contesting State officials or organs is to be recognized as the *de jure* authority. The first of these includes those cases in which a decision becomes necessary in order to determine a matter of direct Federal concern. Thus, formerly, when each of two contesting State legislatures elected and sent senators to Congress, it was necessary for the United States Senate to decide which of the two electing bodies was endowed with the authority to act on that behalf for the State. So, also, as in the case of Dorr's Rebellion, where Federal aid is needed to suppress domestic disorder, it is necessary for the President or Congress to determine which government, claiming authority, it will recognize.

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[8] 241 U. S. 565, 569.

The second class of cases in which the Federal Government, through its Supreme Court, will assume jurisdiction of a dispute between parties as to who is entitled to a State office, is where a claim is made that the State laws, as applied by the State authorities, in settlement of the dispute, have violated that provision of the Fourteenth Amendment which declares that no State "shall deprive any person of life, liberty, or property, without due process of law," or have violated the tenth section of Article I of the Constitution of the United States, which declares that no State shall pass a law impairing the obligation of a contract.

§ 116. Public Office Not a Property or Contract Right.

The Supreme Court of the United States has held in an unqualified manner, that, as between a State and an office-holder, there is no contract right possessed by the latter either to the office or to the salary attached to it, and that, therefore, in the absence of express constitutional provision otherwise, his removal from office or the abolishment of the office itself gives to him no cause of action against the State.[9]

§ 117. Suits Between Two or More Claimants to State Office.

When the dispute is not one between the State and one of its officers, but between two individuals each claiming the office and its emoluments, —when, in other words, the office itself is not disturbed nor the salary changed, the question is a different one. Then, it would seem, the office has often to be treated as a piece of property of which the owner may not be deprived without due process of law even by the State itself.[10]

§ 118. Federal Control of Suffrage in the States.

By the Fourteenth Amendment it is provided that "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the

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[9] Butler v. Pennsylvania (10 How. 402); Taylor v. Beckham (178 U. S. 548).

It is to be observed, however, that when a State in a fiscal capacity enters into contracts with private persons for services to be rendered or materials to be furnished, it is to be regarded *pro hac vice* as a private person and as bound accordingly. "When a State becomes a party to a contract as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty." Davis v. Gray (16 Wall. 203). See also Curran v. Arkansas (15 How. 304).

[10] Kennard v. Louisiana (92 U. S. 480); Foster v. Kansas (112 U. S. 205); Wilson v. North Carolina (169 U. S. 586); Taylor v. Beckham (178 U. S. 548).

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein [in Congress] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." No serious attempt has been made to enforce this constitutional mandate, although, as is well known, in a number of the States, by one means or another, the suffrage has been, in effect, denied to male adult citizens upon grounds other than those specified in the Amendment.

By the Fifteenth Amendment it is declared in unqualified terms that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." And, by the Nineteenth Amendment it is declared that "the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

§ 119. Federal Control of Eligibility to State Offices.

There is no express provision in the Federal Constitution in limitation of the plenary right of the States to determine the qualifications for election or appointment to State offices. It would seem, therefore, that should they, or any of them, see fit to disqualify persons for public office on account of sex or color or for any other reason, they would be within their constitutional right so far as the Federal Constitution is concerned.

There are no cases, so far as the author knows, which expressly declare this doctrine, but there are State decisions which imply it.[11]

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[11] See *In re* Opinion of the Justices (139 Atl. Rep. 180 [N.H.]), and other opinions therein cited.

CHAPTER XII

FEDERAL SUPERVISION OF STATE ACTIVITIES

§ 120. The Fourteenth Amendment.

In the chapters which have gone before, the manner in which the Federal Government is secured from interference on the part of the States has been considered. We turn now to a topic which, while closely related to this subject, is yet distinct from it. This topic is the extent of the constitutional power of the Federal Government to examine State laws and supervise their execution with a view to seeing that they do not infringe in any way upon the rights secured to individuals by the Federal Constitution. In other words, the question now to be considered is not the maintenance of the supremacy of the Federal Government, but the protection of individuals in the enjoyment of the rights and immunities guaranteed to them by the Federal Constitution.

Prior to the adoption of the Fourteenth Amendment in 1868 the laws of the individual States, so long as they related to subjects over which the States had the right of legislation, were not subject to examination in Federal courts with a view to ascertaining whether they deprived anyone of life, liberty, or property without due process of law, or denied to anyone equal legal protection. The first nine amendments to the Federal Constitution which enumerated the fundamental rights of individuals that might not be violated were, from the beginning, construed to limit not the States but only the Federal Government. Until, therefore, the Fourteenth Amendment was adopted there was, so far as the Federal Constitution and laws were concerned, nothing to prevent the several States from enacting laws which denied to their own citizens the equal protection of the laws or deprived them of life, liberty, and property, without due process of law. The only express limitations laid upon the States by the Constitution with reference to distinctively private rights, were that they should enact no bills of attainder, or *ex post facto* laws, or laws impairing the obligation of contracts or make anything but gold and silver coin a tender in payment of debts. As a matter of fact, all of the States had, by their own Constitutions, taken from their legislatures the power to enact laws upon certain specified topics, and forbidden them to violate certain declared principles of justice and right. But the adoption of these constitutional limitations had been purely voluntary upon their part. As regards what is now known as due process of law upon its substantive side, the general expectation, and, to a considerable extent, the judicial doctrine, was that private property rights would be protected against legislative spoliation by asserting the sanctity of "vested rights." [1]

In 1868, however, as one of the results of the Civil War, the Fourteenth Amendment was adopted, which, after declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," goes on to provide that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For a number of years after the adoption of this Amendment it was by no means certain that the effect of the above-cited provisions would not be to endow the United States Government with additional legislative powers so great as fundamentally to alter the nature of the Union itself. There can be no question that the clauses of the Amendment which have been quoted were easily susceptible of an interpretation that would have given them this result, and that, at the time they were framed and adopted by Congress and ratified by the necessary number of State legislatures, there were very many who believed that they would, and desired that they should, work this revolutionary change in the American constitutional system.[2] Fortunately, however, as all must now believe, the Supreme Court was led to give to these words a construction that has robbed them of such an effect.

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[1] "In this aspect of the matter, the leading doctrine of constitutional law during the first generation of our history was the doctrine of *vested rights*, under warrant of which the courts treated any legislative enactment unduly infringing upon property rights without making compensation to the owners, as utterly beyond the purview of the legislative power, even though not specifically inhibited by the letter of the written Constitution. Van Horne v. Dorrance (2 Dall. 304); Calder v. Bull (3 Dall. 386); Dash v. Van Kleeck (7 Johns. 477). This doctrine at first set forth in mere dicta, soon found wide acceptation, having marked effect on other concepts of Constitutional law. It was on this basis that Kent established the doctrine that the power of eminent domain could be exercised for a public purpose only, that is, for a purpose judged by the courts to be public, and the further doctrine that in exercising the power of eminent domain the State must make compensation not only for the property actually taken, but also for incidental damages accruing to adjoining property. On the same foundation, too, it is that Marshall's doctrine in the Dartmouth College case ultimately rests." E. S. Corwin, *National Supremacy*, p. 113.

[2] See especially the debates attendant upon the passage of the Civil Rights Bill of 1866, the doubts as to the constitutionality of which led to the adoption of the Fourteenth Amendment. See also the dissenting opinion of Justice Field in the Slaughter House cases (16 Wall. 36), and of Justice Harlan in the Civil Rights cases (109 U. S. 3). See also Flack, *The Adoption of the Fourteenth Amendment*.

In the pages which immediately follow there will not be attempted a comprehensive examination of the manner in which the Fourteenth Amendment has been interpreted. This will be found, under specific heads, in subsequent chapters. In the present chapter the discussion will be limited to the question as to the extent to which the Amendment altered the general character of the American constitutional system, and especially the extent to which Congress was given an increased legislative power, or the Federal Government a broadened jurisdiction to oversee and control the manner in which the States exercise their reserved powers.

§ 121. Federal Privileges and Immunities—The Slaughter House Cases.

The famous Slaughter House cases,[3] decided in 1873, grew out of the following facts: The State of Louisiana in the exercise of its "police powers," had passed an act chartering a company, and giving to it the exclusive right to establish and maintain stock-yards, landing places, and slaughter houses in the City of New Orleans, and providing that all animals intended for food should be slaughtered there. The plaintiffs in the cases that have since come to be known as the "Slaughter House Cases" alleged that this act was unconstitutional as tested by the Federal Constitution on the several grounds that it was in violation of the Thirteenth Amendment in that it created an involuntary servitude upon the part of those who were compelled to resort to this privileged company; and that it was in violation of the Fourteenth Amendment in that it deprived persons of liberty and property without due process of law, denied to them the equal protection of the laws, and abridged the privileges and immunities of citizens of the United States. It is only with this last claim that we are now concerned.

As we shall later see, the Fourteenth Amendment has been construed to give to the Federal courts the power of examining whether, in the exercise of their ordinary police and other powers, the States have denied to anyone due process of law or the equal protection of the laws. The claim, however, that the rights and immunities which were alleged to have been violated by the Louisiana statute came within the scope of the phrase "privileges or immunities of citizens of the United States" as used in the Fourteenth Amendment, raised the fundamental question whether or not, by that Amendment, the entire so-called "police powers" of the States had been placed within the direct legislative definition and control of Congress. This would have resulted from the fact that by the Amendment Congress is given authority to enforce its provisions by appropriate legislation. If, therefore, such a right as was here alleged to have been violated could be held to be a Federal right it would be within the power of Congress to define it, and all other similar rights, and to impose penalties upon their violation, and thus to deprive the States of their entire police powers. These police powers, it is scarcely necessary to observe, cover almost the entire field of private rights, personal and proprietary, including, as they do, the general authority of the State to legislate regarding the social, economic, and moral welfare of its citizens. To have granted the contention of the plaintiffs would thus have made Congress, instead of the State legislatures, the possible source of the great body of private laws by which the citizen is governed. It is, therefore, not surprising that the court in its majority opinion should have said: "We do not conceal from ourselves the great responsibility which . . . devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."

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[3] 16 Wall. 36.

The argument of the plaintiffs, which did not convince the majority of the court, but which did convince the minority, was that the individual, as a free man and citizen of a State, had, before the adoption of the Amendment, certain fundamental rights, privileges, and immunities, which were determined by State statutes and the general principles of the common law, and that by that Amendment the citizen became primarily a citizen of the United States, and only secondarily, by residence, a citizen of a particular State of the Union, and that, therefore, these fundamental rights, privileges, and immunities which formerly belonged to him as a citizen of the State in which he lived now became his as a citizen of the United States, and, as such, no longer subject to abridgment by the States. Only by this interpretation, it was argued, could the clause of the Amendment which we are considering, be given any force whatever.

The majority of the court were not able to accept this construction of the Amendment which, as we have seen, would have opened such possibilities of increasing the Federal powers at the expense of those of the States. Referring to "the history of the times" in which the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, the court found in them a unity of purpose,—the protection of the freed negroes,—and not an intention radically to alter the constitutional character of the Union. Attention was called to the fact that the Fourteenth Amendment implies and by its language recognizes a continuance of a distinction between Federal and State citizenship, and that from this it follows that the privileges and immunities attaching to or growing out of each are to be distinguished.

§ 122. Legislative Power Granted Congress by the Fourteenth Amendment.

From the foregoing cases it appears that the clause of the Fourteenth Amendment which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," has not given to the General Government any legislative or even supervisory power which it did not possess before the Fourteenth Amendment was adopted.

In 1875, in pursuance of an authority which it conceived to be granted by the Fourteenth Amendment, Congress passed a so-called Civil Rights Act, fixing generally the penalties to which State officials should be subject for depriving any citizen of the United States of any of the rights secured him by the Thirteenth and Fourteenth Amendments, and declaring specifically that negroes should receive the same treatment at public inns, hotels, railways, theaters, etc., as that enjoyed by white persons. The importance of this act lay in the fact that, by passing it, Congress indicated that it interpreted the Fourteenth Amendment not only as giving it power to punish persons who should deprive others of any of the rights mentioned in that Amendment, but as empowering it to determine specifically what those rights should be. If this were to be accepted as the correct interpretation of the power of Congress under this Amendment, it was clear that the reserved powers of the States would henceforth be at the mercy of the Federal legislative body; for thus the way would be opened to Congress, should it see fit, to convert by its statutes all private rights into Federal rights and as such exclude them from State regulation or violation.

In the Civil Rights cases,[4] decided in 1883, the court laid down, authoritatively and finally, the doctrine that it is not within the legislative power of Congress to define what are the civil rights of individuals, and to affix and enforce penalties for their denial by private persons. Hence, the court held unconstitutional and void those portions of the Civil Rights Act of 1875 which attempted to do this. Of the Amendment, the court said: "It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment." [5]

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[4] 109 U. S. 3. See also Corrigan v. Buckley (271 U. S. 323, 330); United States v. Wheeler (254 U. S. 281, 298).

[5] As construed in the Civil Rights cases it is to be noted that the Federal legislative power granted by the Fourteenth Amendment is narrower than that granted by the enforcement clause of the Thirteenth Amendment. This distinction the court in its majority opinion in the Civil Rights cases pointed out in the following language:

Although by the decisions in the Slaughter House and subsequent cases in the Supreme Court, the commands laid upon the States to respect Federal privileges and immunities have thus been shorn of all but declaratory significance, and the general police powers confirmed in the Commonwealths, the other prohibitions of the first section of the Fourteenth Amendment have been so construed by the Supreme Court as to give to the Federal Government a very extensive supervisory jurisdiction over State legislation which it did not possess prior to 1868. Whenever a claim has been made that a State law has worked a deprivation of life, liberty, or property without due process of law, or has resulted in a denial to any person of the equal protection of the laws, the Federal courts have assumed jurisdiction, and, when the claim has been sustained, declared such statutes void. Illustrations of this Federal supervisory power will appear throughout this treatise.

In the Slaughter House cases, the court declared, relative to the clause providing for the equal protection of the laws: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." This *obiter dictum* has, however, been since disregarded.

§ 123. Prohibitions of the Fourteenth Amendment Relate Only to State Actions.

It will have been noticed that the doctrine of the Civil Rights cases depended in large measure upon the assertion that the prohibitions of the Fourteenth Amendment were directed exclusively against State acts, that is, acts authoritatively sanctioned by the States as such, or officially performed by their agents, and that they had no reference to the acts of private individuals. This doctrine had already been established in a line of cases decided prior to the Civil Rights cases.

In Strauder v. West Virginia [6] it was held that a State law which excluded negroes from jury service was unconstitutional as a denial to

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"This [Thirteenth] Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." That the Civil Rights Act could not be enforced even in the District of Columbia, see Butts v. M. & M. Transportation Co. (230 U. S. 126).

[6] 100 U. S. 303.

members of that race of the equal protection of the laws. In Virginia v. Rives[7] the question was not as to the existence of a State law excluding negroes from jury service, but as to the administration of a law, not in terms discriminative, in such a way as to exclude negroes from juries. This suit was sought to be removed into the Federal courts under the provision of Section 641 of the Revised Statutes. Without deciding whether or not Congress had, under the enforcement clause of the Fourteenth Amendment, the power to grant relief in cases such as that presented by the petitioner, the Supreme Court held that the suit was not within the terms of the statute.

In *Ex parte* Virginia[8] a somewhat different state of facts was presented. Here there was no State law the constitutionality of which was questioned. A judge of a State court, charged by the law of that State with the duty of selecting jurors, was indicted in a Federal court for excluding from the grand and petit jury list a certain individual because of his race or color, in violation of a provision of the act of Congress of 1875. Upon a petition of the accused to the Supreme Court of the United States for a writ of habeas corpus or a writ of certiorari to bring up the record of the lower court in order that he might be dismissed, the Supreme Court denied the writs, holding, in effect, that this act of the judge, involving no necessary exercise of judicial discretion, was committed by him in his official capacity as judge, was an act of the State which he represented, and as such came within the prohibition of the Fourteenth Amendment. The opinion declared: "The prohibitions of the Fourteenth Amendment are directed to the States. The constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the act of March 1, 1875, 18 Stat. at L., 336, and we think it was fully authorized by the Constitution. . . . We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from the obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience."

These general principles—that the prohibitions of the Amendment are upon the State and not upon individuals; that Congress has no primary and direct legislative authority to define and enforce the rights guaranteed by the Amendment; that the general "police powers" are still possessed by the States;—have not been departed from by the court in subsequent cases.[9]

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[7] 100 U. S. 313.

[8] 100 U. S. 339.

By some it has been argued that, under the Fourteenth Amendment, Congress is competent to provide that a penalty shall be imposed upon a State, recoverable by a suit by the United States against the State, for a failure upon the part of the State to give reasonably adequate protection to persons, against mob or riotous violence, and also that State officials may be made criminally liable for failure upon their part to give such protection.[10]

§ 124. Effect of Fourteenth Amendment Upon Rights Enumerated in First Eight Amendments.

In *Ex parte* Spies[11] the point was urged upon the court that the privileges and immunities secured against Federal infringement by the first eight Amendments to the Federal Constitution, were, because so secured, Federal privileges and immunities, which, according to the Fourteenth Amendment, and the doctrine of the Slaughter House cases the States might not abridge or deny. The court, however, found that, in fact, no right of Spies secured by the first eight Amendments had been violated, and that, therefore, it was not necessary to pass upon this constitutional point which his counsel had raised.

In Maxwell v. Dow,[12] however, the court found itself compelled to pass specifically upon this point and held that the mere fact that a certain privilege or immunity was guaranteed against Federal infringement did not operate to make such a privilege or immunity distinctively Federal in character.

§ 125. Federal Privileges and Immunities—Enumeration of.

With reference to the question that is immediately suggested, as to what are these distinctively Federal rights which the States are not to infringe, the court said in the Slaughter House cases: " Lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws. One of these is well described in the case of Crandall v. Nevada.[13] It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.' And, quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the Federal Government was established, we are one people, with one common country; we are all citizens of the United States,' and it is, as such citizens, that their rights are supported by this court in Crandall v. Nevada. Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States, can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as the other citizens of that State. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendment, and by the other clause of the Fourteenth, next to be considered." [14]

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[9] For interesting cases, see Neal v. Delaware (103 U. S. 370); Logan v. United States (144 U. S. 263); James v. Bowman (190 U. S. 127); Raymond v. Chicago Union Traction Co. (207 U. S. 20); Home Tel. & Tel. Co. v. Los Angeles (227 U. S. 278); Tarrance v. Florida (188 U. S. 519); Yick Wo v. Hopkins (118 U. S. 356).

[10] See the various "Anti-Lynching Bills" which from time to time have been introduced in Congress. See H. R. Rpt. No. 71, 68th Cong., 1st Sess., and Senate Rpt. 837, 67th Cong., 2d Sess.

[11] 123 U. S. 131. See also Twining v. New Jersey (211 U. S. 78).

[12] 176 U. S. 581.

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[13] 6 Wall. 35.

[14] Cooley, in his *Principles of Constitutional Law*, p. 245, gives the following enumeration of distinctively Federal rights: "A citizen of the United States," he says, "as such has the right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are coerced by its law. . . . So every citizen may petition the federal authorities which are set over him in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas, or within the jurisdiction of a foreign govern-

In Duncan v. Missouri[15] it was declared that "The privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal Government, and granted or secured by the Constitution." [16]

§ 126. Suffrage Not a Necessary Incident of Citizenship.

In Minor v. Happersett[17] it was held that the suffrage is not a right springing from Federal citizenship. This doctrine was declared in passing upon the claim made in that case by a woman that because of her Federal citizenship she could not constitutionally be disqualified from voting on account of her sex. In passing upon this claim the court admitted that citizenship was not dependent upon sex, but denied that the right of suffrage was necessarily attached to the status of citizenship.

However, by the Nineteenth Amendment the right of women not to be denied the vote on account of their sex has been made a Federal right.

§ 127. Voting in Primaries.

In Nixon v. Herndon[18] it was held that the equal protection clause of the Fourteenth Amendment was violated by a State statute which provided that "in no event shall a negro be eligible to participate in a Democratic primary election held in the State of Texas." "We find it unnecessary to consider the Fifteenth Amendment," said the court, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." The suit was one against the Judges of Election for damages for refusal to allow the plaintiff to vote. To the objection that the subject-matter of the suit was political in character,

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ment. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship." "One very plain and unquestionable immunity," Cooley adds, "is exemption from any tax burden, or imposition under state laws, as a condition to the enjoyment of any right or privilege under the laws of the United States."

[15] 152 U. S. 377.

[16] Mr. A. J. Lien, in his study "Privileges and Immunities of Citizens of the United States" (Columbia University Studies in History, *Economics and Public Law*, Vol. LIV, p. 80) gives a list of distinctive Federal privileges or immunities, together with the cases in which they have been declared.

As to the power of Congress to provide for the punishment of individuals interfering with, or conspiring to interfere with the exercise by others of rights created by or dependent upon the Federal Constitution or laws, see *Ex parte* Yarbrough (110 U. S. 651); United States v. Waddell (112 U. S. 76); Motes v. United States (178 U. S. 458).

[17] 21 Wall. 162.

[18] 273 U. S. 536.

the court said: "Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since Ashby v. White,[19] and has been recognized by this Court."[20]

In Love v. Griffith[21] the court sustained the ruling of a State court that no opportunity existed to grant injunctive relief with reference to the exclusion of a negro from a municipal primary election which had already taken place, the exclusion having been based upon a rule promulgated by the city Democratic committee which was not to be of continuing force but applicable only at the given election. The Supreme Court said that had the question come before it prior to that election it would have presented a grave question of constitutional law.

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[19] 2 Ld. Raym. 938; 3 Ld. Raym. 320.

[20] Wiley v. Sinkler (179 U. S. 58); Giles v. Harris (189 U. S. 475).

[21] 266 U. S. 32.

CHAPTER XIII

INTERSTATE RELATIONS; FULL FAITH AND CREDIT CLAUSE

§ 128. States Independent of One Another.

In the chapters which have gone before the constitutional relations which exist between the Federal Government upon the one side and the States upon the other side have been considered. In the present and immediately following chapters the relations which exist between the several States will be discussed.

Except as otherwise specifically provided by the Federal Constitution, the States of the American Union, when acting within the spheres of government reserved to them, stand toward one another as independent and wholly separated States. The laws of each State have no force, and its officials have no public authority, outside of the State's territorial boundaries. As to all these matters their relations *inter se* are governed by the general principles of Private International Law, or, as otherwise termed, the Conflict of Laws. It may also be said that the territorial character of the quasi-sovereignty of the States is determined by the accepted principles of general public or international law. Thus, as will presently be pointed out, a State of the Union is without the jurisdiction, not because of Federal constitutional limitations, but by reason of the limitations of its territorial sovereignty, as fixed by general Anglo-American jurisprudential principles, to enforce the penal acts of a sovereignty other than its own, to enter personal judgments against persons who have not been personally served within the State,[1] or to determine titles to lands outside the State, or to grant a divorce to non-domiciled petitioners. It thus becomes important to distinguish between the competency of a court to render a judgment, and the competency of a court to enforce a judgment which has been rendered, or a right which has arisen, in another jurisdiction.

During the colonial period the judgments of the courts of the colonies were, as to one another, strictly foreign judgments. That is, they could be impeached for fraud or prejudice, and their merits reëxamined. The inconvenience of this state of affairs was soon recognized, and, in the Articles of Confederation, it was provided that "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Article IV, Section 1 of the Federal Constitution provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." The important difference between this provision and the corresponding one in the Articles of Confederation is that the Congress is given authority to fix by statute the manner in which these acts, records, and proceedings shall be proved and to determine the effect that shall be given them when thus proved.

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[1] As to possible exceptions. See Goodrich, *Conflict of Laws*, §§ 73–74.

§ 129. Congressional Legislation.

By a law passed in 1790 Congress provided: "That the acts of the legislature of the several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." [2]

In 1804 this act was supplemented by one which, after providing for the authentication of other than judicial records, declared, in its second section: "And be it further enacted, that all the provisions of this act, and the act to which this is a supplement [Act of 1790] shall apply as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective Territories of the United States and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several States." [3]

In Mills v. Duryee [4] decided in 1813, the Supreme Court, construing these acts, held that by them Congress had not only provided for the admission of authenticated judgments of a State as evidence in the courts of the other States in the Union, but that it had, in execution of the constitutional provision, declared that they should be conclusive evidence of all matters properly adjudicated therein.

"The effect of this clause is to put the judgment of the court of one State, when sued upon, or pleaded in estoppel, in the courts of another

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[2] 1 U. S. Stat. at L. 122.

[3] 2 U. S. Stat. at L. 298. These two sections are united in Sections 905 and 906 of the Revised Statutes.

[4] 7 Cr. 481.

State, upon the plane of a domestic judgment in respect of the conclusiveness as to the facts adjudged. But for this provision, such State judgments would stand upon the footing of foreign judgments, which are examinable when sued on in the courts of another country, being only prima facie evidence of the matter adjudged." [5]

"Judgments recovered in one State of the Union, when proved in the courts of another, differ from the judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." [6]

§ 130. Limitations, Statutes of.

It is established that the statute of limitations of the State where enforcement is sought may be filed in bar to a suit upon a judgment of a sister State. In other words, such a plea is to the remedy and not the rights that are involved.[7] However, in Christmas v. Russell,[8] the court held unconstitutional a Mississippi law which declared that a judgment recovered in other States against citizens of Mississippi should not be enforced in the courts of that State if the cause of action which was the foundation of the judgment would have been barred in the Mississippi courts by the Statute of Limitations of Mississippi. This statute, the court declared, was not a Statute of Limitations in any sense known to the law, but was an attempt to give operation to the Mississippi statute in all the other States of the Union.[9]

§ 131. Full Faith and Credit Clause Does Not Apply to Courts of the Territories and the District of Columbia.

This full faith and credit clause, it is to be observed, has reference only to the States, and not to the Territories or to the District of Columbia. Therefore it has been decided that the acts of Congress, in as far as they have reference to the Territories and to the District of Columbia, rest, for their constitutionality, upon other clauses of the Constitution.[10]

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[5] Bigelow v. Old Dominion Copper Mining Co. (225 U. S. 111). See also D'Arcy v. Ketchum (11 How. 165).

[6] Hanley v. Donoghue (116 U. S. 1). Citing Buckner v. Finley (2 Pet. 586); M'Elmoyle v. Cohen (13 Pet. 312); D'Arcy v. Ketchum (11 How. 165); Christmas v. Russell (5 Wall. 290); Thompson v. Whitman (18 Wall. 457).

[7] M'Elmoyle v. Cohen (13 Pet. 312). In Bacon v. Howard (20 How. 22), the court said: "There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits."

[8] 5 Wall. 290.

[9] As to this case, see § 136.

[10] Embry v. Palmer (107 U. S. 3).

The same reasoning that in Embry v. Palmer supports the power of Congress to give to judgments rendered by the courts of the District of Columbia full force and credit in the States, is sufficient to support its power to give equal force in the States to judgments rendered in the Territories and insular possessions of the United States, and *vice versa* as to State judgments sued upon in the Territories or in the insular possessions.[11]

§ 132. Federal Judgments and Decrees.

In numerous cases it has been held that full faith and credit is to be given to judgments of Federal courts obtained in one State or Territory when sought to be enforced in the courts of another State or Territory, or the District of Columbia. This is due to the fact that, as the Supreme Court say in Claflin v. Houseman,[12] "The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, a paramount sovereignty."

§ 133. Public Acts.

The term Public Acts as used in the full faith and credit clause has not been defined by the Supreme Court, but it has been assumed by the courts that it refers to the legislative acts and Constitutions of the States. As to these Public Acts the clause operates to require that they shall be given the same effect by the courts of the other States as they have by law and usage at home.[13] However, it is well settled that the mere construction by a State court of a statute of another State, without questioning its validity, does not deny to the statute the faith and credit constitutionally due it.[14] If the constitutional provision or statute has been construed by the highest court of the enacting State, that construction will, ordinarily, but not necessarily, be followed by the courts of another State. For the doctrine seems well established that the requirements of the full faith and credit clause have been satisfied when the validity of the public act has been accepted by the court of another State in which its existence has been duly proved according to the method prescribed by Congress.

No question with regard to the application of the full faith and credit clause arises where, in a State court, the validity of a legislative act of another State is not in question, and the controversy turns merely upon its interpretation.[15]

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[11] "This language [of the Court in Embry v. Palmer] is equally applicable to legislative acts of the territory." Atch. T. & S. F. R. Co. v. Sowers (213 U. S. 55). Citing New Mexico v. Denver & R. G. R. Co. (203 U. S. 38).

[12] 93 U. S. 130.

[13] Chicago & Alton R. Co. v. Wiggins Ferry Co. (119 U. S. 615).

[14] Glenn v. Garth (147 U. S. 360); Lloyd v. Matthews (155 U. S. 222); Allen v. Alleghany Co. (196 U. S. 458); Smithsonian Institution v. St. John (214 U. S. 19).

Mere error in construing a statute of another State will not furnish a basis for a claim that full faith and credit has been denied to such statutes.[16]

The full faith and credit clause places no obligation upon the courts of the States to keep their decisions in conformity with the principles of the "general law of the land," that is, independently of the particular jurisprudence of a particular State in whose courts a judgment has been obtained.[17]

"The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial." [18]

In Hartford Life Insurance Co. v. Barber [19] it appeared that, by the decree of a Connecticut court, a life insurance company of that State had been declared competent to do certain things. A Missouri court, in another case, with reference to rights and obligations arising under the exercise by the company of the powers which the Connecticut court had declared it to possess, declared that the company had no such powers. Upon error, the Federal Supreme Court held that the powers given by the Connecticut charter were entitled to the same credit elsewhere as the judgment of the Connecticut court,[20] and that full faith and credit had not been given by the Missouri court to the Connecticut record.

"Whenever it becomes necessary under this requirement of the Constitution for a court of one State in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of a State is charged with knowledge of the laws of another State; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This [Supreme] court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in Hanley v. Donoghue, 116 U. S. 1." [21]

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[15] Western Life Indemnity Co. v. Rupp (235 U. S. 261), and cases therein cited.

[16] See Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co. (243 U. S. 93), and cases therein cited.

[17] Chicago & Alton R. Co. v. Wiggins Ferry Co. (119 U. S. 615), and cases therein cited.

[18] Finney v. Guy (189 U. S. 335).

[19] 245 U. S. 146.

[20] Citing Royal Arcanum v. Green (237 U. S. 531).

§ 134. Full Faith and Credit Clause Applies Only to Civil Judgments.

It is established that the full faith and credit clause does not obligate the courts of one State to enforce the penal judgments and decrees of the courts of another State. This results from the fact that, according to the generally accepted doctrines of public law which determine territorial jurisdiction, one sovereignty is, by its inherent nature, without jurisdiction to enforce the penal acts or decrees of another sovereignty. As to civil acts and decrees there is no such incompetence, but no obligation of enforcement save that of international comity, or, in the case of the States of the American Union, that imposed by the full faith and credit clause of the Federal Constitution.

The foregoing doctrines were fixed once for all by the Supreme Court in Wisconsin v. Pelican Insurance Co.[22]

§ 135. Penal Laws and Judgments Defined.

In Huntington v. Attrill [23] the question as to the distinction between civil and penal causes was examined with especial care. The question was as to whether, under the full faith and credit clause, the courts of Maryland were obligated to enforce a judgment recovered in a New York court against officers of a corporation, by a creditor thereof for making a false certificate of the amount of capital stock paid in under a law of New York which made such officers, under such circumstances, liable for the debts of the corporation. Such a judgment the Supreme Court held not to be penal in character, and, therefore, that the courts of other States were called upon to enforce it. The court said: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

This case made more plain than had previously been shown in Wisconsin v. Pelican Insurance Co.[24] that, according to general or international jurisprudence, as it existed at the time the Constitution was adopted, and has since existed, no State, by reason of international comity or otherwise, deems it proper, or itself competent, to lend its aid, directly or indirectly, for the enforcement of the penal laws or judgments of another State,[25] and, therefore, that the obligation of the full faith and credit clause of the Federal Constitution cannot have been intended to place the States of the Union under any obligation with reference to penal laws or judgments founded thereon: in other words, that the only purpose of the clause is to make constitutionally obligatory that respect which, according to the accepted doctrines of conflict of laws, the States of the world are accustomed to pay to the public acts and records of each other. To hold otherwise, the court said would in effect be to vest the courts of the States with a jurisdiction and to compel them to exercise it, which, according to settled principles of general public law the courts of the several sovereignties of the world are deemed to be without, or, at any rate, under no obligation of international comity to exercise.

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[21] Chicago & Alton R. Co. v. Wiggins Ferry Co. (119 U. S. 615).

[22] 127 U. S. 265.

There are some early cases in which State courts gave effect to penal judgments e. g., Spencer v. Brockway (1 Ohio, 259); Healy v. Root (11 Pick. 389); Indiana v. Helmer (21 Ia. 370). These cases are now of no authority.

[23] 146 U. S. 657.

[24] 127 U. S. 265.

Upon similar grounds it has been held that the courts of a State of the Union cannot be compelled to take jurisdiction of a suit to recover penalties for the violation of laws of the United States.[26]

So, also, it is established, that the Federal courts, except in cases removed into them from State courts, in order to protect rights under the Constitution and laws of the United States, cannot entertain jurisdiction of suits to enforce criminal laws of the States, or to recover penalties imposed by way of punishment for the violation of laws of the States.[27]

As being simply evidence, judgments of the courts of one State, when sued upon in another State, are subject, as regards procedure and remedies, to the law of the latter State. For example, the statute of limitations of the State where suit is brought is applied even though it provides a shorter term of years than that existing in the State in which the judgment was originally obtained.[28]

Whether or not a judgment the enforcement of which is sought in a State other than the one in which it was originally rendered is penal or civil in character is a matter to be decided in the first place by the court in which enforcement is sought, and finally upon appeal, by the Supreme Court.[29]

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[25] Even the matter of the extradition of fugitives from justice has to be arranged for by special treaties.

[26] Martin v. Hunter's Lessee (1 Wh. 304); United States v. Lathrop (17 Johns. 4). In Claflin v. Houseman (93 U. S. 130), it was urged that judgments of the Federal courts, even in criminal cases, should be given full faith and credit in the State courts because Federal laws were to be considered as, in effect, laws of each of the several States, but the court, speaking through Mr. Justice Bradley, said: "It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty." See also *Re* Loney (134 U. S. 372).

[27] Gwin v. Breedlove (2 How. 29); Gwin v. Barton (6 How. 7); Dey v. Chicago, M. and St. P. R. Co. (45 Fed. Rep. 82).

[28] M'Elmoyle v. Cohen (13 Pet. 312); Bacon v. Howard (20 How. 22).

§ 136. Local Policy of States Where Enforcement Is Sought.

As between independent and sovereign States international comity does not obligate one State to give faith and credit to the judgments and decrees of tribunals of other States founded upon laws, customary or statutory, which are in conflict with its own public policy. There have been some cases in which State courts have held that this doctrine has not been disturbed (as between the States of the American Union) by the full faith and credit clause of the Federal Constitution, but it is clear that this holding is not a correct one and finds no support in the decisions of the United States Supreme Court. It is true that it is optional with each State whether it will enforce in its courts statutory civil rights accruing under the laws of the other States, but, when a court of competent jurisdiction has rendered a judgment based upon such rights, and suit is brought upon that judgment in the courts of another State, there remains no option as to giving to that judgment full faith and credit. In other words, those courts cannot go back of the judgment in order to determine whether the law upon which it was founded was in consonance with the policy of the State where enforcement is sought, in order to refuse enforcement if it be found that there is not such a consonance. Fauntleroy v. Lum[30] and Converse v. Hamilton[31] would seem to be decisive as to this, and as repudiating *dicta* to the contrary in Finney v. Guy [32] and Allen v. Alleghany Co.[33]

Under a number of differing circumstances the question has been raised as to whether the obligation of the full faith and credit clause has been violated when the courts of one State have declared themselves, by reason of the statute law of their own State, to be without jurisdiction or authority to enforce the judgments or decrees of the courts, or the rights accruing under the laws of another State. This question has necessitated the drawing by the Supreme Court of a number of fine distinctions which space does not permit to be here discussed. The leading cases, however, are referred to in a footnote.[34]

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[29] Huntington v. Attrill (146 U. S. 657).

[30] 210 U. S. 230.

[31] 224 U. S. 243.

[32] 189 U. S. 335.

[33] 196 U. S. 458. See also Hancock National Bank v. Farnum (176 U. S. 640); and Roche v. McDonald (275 U. S. 449).

[34] Christmas v. Russell (5 Wall. 290); Anglo-American Provision Co. v. Davis Provision Co. (191 U. S. 373); Fauntleroy v. Lum (210 U. S. 230); Kenney v. Supreme Lodge of the World (252 U. S. 411).

It has been held in numerous cases that each State of the Union, though not compelled to do so by the full faith and credit clause of the Constitution, may, as a matter of comity, enforce in its own courts, which have jurisdiction of the parties and subject-matters, civil rights of actions depending solely upon the statutes of another State.[35]

To what extent the courts of one State will permit civil action to be maintained upon transactions accruing in another State, and even such as are in contravention of the statutes of that State, is a matter for those courts themselves to decide. The full faith and credit clause of the Federal Constitution has no application in such cases. Thus in Allen v. Alleghany Co.[36] it was held that no Federal question was raised by the holding of the New Jersey court that an action could be maintained upon a contract executed in the State of New York by a corporation foreign to that State, which contract was in contravention of the statutes of that State and not enforceable in its courts.

§ 137. Nul Tiel Record.

In the immediately preceding sections the competency of the enforcing court has been considered. In the following sections will be considered the competency of the court rendering the judgment or issuing the decree which the courts of other States are called upon to enforce.

It is clear that the courts of one State are not expected to enforce judgments, decrees, or laws which are not valid in the States in which they are rendered or enacted. In other words, the validity of all judgments or decrees is dependent upon the court which renders them having jurisdiction in the premises.

Whether or not the court in which the judgment was originally obtained, had obtained jurisdiction is to be determined by the court in which enforcement of the judgment is sought according to generally accepted principles of jurisprudence.[37]

§ 138. Judgments in Rem and in Personam.

The validity of judgments or decrees in States other than those in which they are obtained depends upon the court which rendered them having obtained jurisdiction. In order to obtain jurisdiction in actions

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[35] Dennick v. Central R. R. Co. (103 U. S. 11); Stewart v. B. & O. R. R. Co. (168 U. S. 445); Slater v. Mexican National R. R. Co. (194 U. S. 120); Atcheson, etc., R. Co. v. Sowers (213 U. S. 55).

[36] 196 U. S. 548.

[37] Bigelow v. Old Dominion Copper Mining Co. (225 U. S. 111). See also D'Arcy v. Ketchum (11 How. 165); Public Works v. Columbia College (17 Wall. 521); Thompson v. Whitman (18 Wall. 457); Hanley v. Donoghue (116 U. S. 1); Huntington v. Attrill (146 U. S. 657); Hall v. Lanning (91 U. S. 160).

in rem, the *res* must be located in the State. In all actions service of notice of the commencement of the suit must be had upon the defendants. In actions *in rem* this service need not be actual, but may be constructive, that is, by publication. In actions *in personam*, however, actual service is required. Mere constructive service will not warrant a personal judgment or decree which may be sued upon in another jurisdiction. This doctrine was carefully laid down in Pennoyer v. Neff.[38]

§ 139. Marriage and Divorce.

The force and meaning of the "full faith and credit" clause of the Constitution has been especially developed in connection with the subject of marriage and divorce and it will, therefore, be proper to state briefly the positions that the Supreme Court has taken upon this important point.

Generally speaking, it has been held in the United States that jurisdiction to grant a divorce depends upon the domicile of the parties. With few exceptions, all of the States of the Union recognize the possibility of the wife obtaining for the purpose of divorce or separate maintenance a domicile separate from that of her husband. Until recently, however, a few States (among them New York) held that where the husband and wife were domiciled in different States, decrees of divorce granted in either State need not be given full faith and credit in the other States. The unconstitutionality of this doctrine was, however, declared by the United States Supreme Court in Atherton v. Atherton.[39]

Until 1906 it had been supposed that a decree of divorce granted the husband or wife by a court of the State in which he or she was domiciled, if the notice of the beginning of the suit required by the local law had been served actually or constructively upon the other party, was to be recognized in all cases as valid in other States. This, it was thought, had been determined in Atherton v. Atherton. This supposition was disturbed by the decision of the Supreme Court in Haddock v. Haddock,[40] and, for a time the doctrine as to this made a matter of doubt, but, by the decision in Thompson v. Thompson[41] the situation was somewhat clarified so that now it may be said that if a wife or husband wrongfully, that is without sufficient excuse or justification, leaves the husband or wife and seeks to obtain a new domicile in another State, he or she cannot there obtain a divorce which will be entitled to full faith and credit in the other States, unless, of course, the other party has been personally served or has made voluntary appearance.

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[38] 95 U. S. 714. See also Bigelow v. Old Dominion Copper Mining Co. (225 U. S. 111); D'Arcy v. Ketchum (11 How. 165); Fall v. Eastin (215 U. S. 1); Bonaparte v. Tax Court (104 U. S. 592); McDonald v. Mabee (243 U. S. 90); Coler v. Corn Exchange Bank (250 N. Y. 136).

[39] 181 U. S. 155.

[40] 201 U. S. 562.

[41] 226 U. S. 551.

It would further appear, though this has not been expressly covered by decisions of the Supreme Court, that, though, in general, a husband can at will change his domicile, he cannot, by using this domicile, secure a divorce from his non-resident wife who has not been personally served or appeared or otherwise given her consent, unless his wife has given him justifiable cause for leaving her. As for the wife, she cannot secure a domicile different from that of her husband which will avail for any purposes unless her husband has given her sufficient cause for deserting him.

CHAPTER XIV

INTERSTATE RELATIONS: THE COMITY CLAUSE

§ 140. Privileges and Immunities.

Article IV, Section 2 of the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This provision has for its general aim the prevention of arbitrary and vexatious discriminations by the several States in favor of their own citizens and against the citizens of other States. "It was undoubtedly the object of the clause in question," said the Supreme Court in Paul v. Virginia,[1] "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[2] Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

In Canadian Northern Ry. Co. v. Eggen[3] it was emphasized that the comity clause does not require that the States shall give to the citizens of other States precisely the same rights as are given to their own resident citizens provided that the rights that are granted to the citizens of the other States are adequate in the premises. Thus, in the instant case, the court upheld a State statute which provided that, when a cause of action arose outside the State and was barred by the laws of the place where it arose, no action should be maintained thereon unless the plaintiff were a citizen of the State which had owned the cause of action since it accrued. In this case the State in which the cause of action had arisen had allowed one year within which to bring action, which period had expired before the bringing of the action. However, if the provision of the State law which has been referred to were held unconstitutional the general Statute of Limitations of the State would apply which allowed six years and would not bar the suit.

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[1] 8 Wall. 168, 180.

[2] Citing Lemmon v. The People of New York (20 N. Y. 562, 607).

[3] 252 U. S. 553.

§ 141. Political Privileges.

The interstate comity clause of the Federal Constitution does not compel the several States to grant to resident citizens of the other States the political privileges extended to their own citizens. This the Supreme Court held from the very beginning and reaffirmed in the case of Blake v. McClung.[4] "A State," said the court in that case, "may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

Furthermore, the several States may impose upon non-residents such special limitations and obligations as are, in aim and effect, not discriminative but reasonably necessary for the protection of their own citizens from fraud, disease, or injury of any sort. Thus, as an example, though the citizens of other States may not be forbidden to sue in the courts of the State, they may be required to give bonds for costs which bonds are not exacted of residents.

In connection with this police power of the States a difficult question is raised as to the constitutionality of laws conditioning the exercise of certain professions, such as law, medicine, and dentistry, upon residence in the State for specified periods of time. There is no question but that the State in the legitimate exercise of its police power may require evidence of good character or sufficient technical attainments of all persons desiring to practice these professions. A certain period of residence in the State may, therefore, possibly be a proper requirement, in order that the applicant's moral character and general attainments may be learned, but it would seem that if this required period be made unnecessarily long, it might be held that non-residents are unduly discriminated against. We have, however, no cases in which this position has been taken.

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[4] 172 U. S. 239, 256. See also Ownbey v. Morgan (256 U. S. 94, 109).

In McCready v. Virginia[5] the important limitation of the clause was established that a citizen of one State is not, of constitutional right, entitled to share upon equal terms with the citizens of another State those proprietary interests which may be said to belong generally to that State as such.

§ 142. Privileges of One State Not Carried into Other States.

The comity clause does not entitle a citizen within his own State to privileges and immunities which may be granted by other States to their citizens. In other words, it does not require that when a right is granted by any one of the States of the Union to its citizens, it thereby becomes a right which all the other States must grant to their citizens. This claim, extreme as it may appear, was raised in McKane v. Durston[6] but negatived by the court as scarcely worth an argument.

§ 143. Corporations Not Citizens within the Meaning of the Comity Clause.

In Paul v. Virginia the doctrine, never since questioned, was laid down that a corporation is not a citizen within the meaning of the term as used in the comity clause. Inasmuch as a corporation is the mere creation of local law, the court declared, it can have no legal existence, or right to do business, beyond the limits of the sovereignty by which it is created. In other words, the interstate comity clause of the Federal Constitution does not necessitate the recognition by the several States of corporations created by any of the other States. "Having no absolute right of recognition in other States," the court said, "but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This principle of State competence when dealing with the corporations of other States is, however, limited in three very important respects.

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[5] 94 U. S. 391.

[6] 153 U. S. 684. See also Paul v. Virginia (8 Wall. 168).

In so far as such corporations are engaged in the conduct of interstate commerce they may not be controlled, the regulation of this subject being exclusively a Federal concern; they may not be deprived of property without due process of law or denied the equal protection of the laws; and the obligation of contracts entered into with them may not be impaired.[7]

In Bothwell v. Buckbee, Mears Co.[8] it was held that a State might not only prohibit a foreign insurance company from doing business within its limits (the issuance of insurance policies not being interstate commerce), but that it might refuse the aid of its courts in enforcing a contract of insurance which involved a violation of its laws. Furthermore, that a contract of insurance executed in one State in accordance with an application theretofore illegally secured in another State was tainted with illegality so that the courts of the State where the application was illegally secured were not obligated to enforce it.

§ 144. Citizens of Territories and Indian Reservations and the Comity Clause.

It has been held that the citizens of Territories and residents upon Indian Reservations are not entitled to the benefits of the comity clause, and that, conversely, non-residents can be denied privileges and immunities that are enjoyed by the residents of these areas.[9] However, as to the inheritance, purchase, lease, sale, holding and conveying of real and personal property, it has been declared by Congress that all citizens of the United States shall have the same rights in every State and Territory as are enjoyed by white citizens therein.[10]

Further application of the comity clause will be considered in connection with the discussion of the taxing and police powers of the States, and the limitations imposed upon them by reason of vesting in Congress of the exclusive power to regulate interstate and foreign commerce, and also by the prohibitions of the Fourteenth Amendment directed to the States as to the denial to persons of the equal protection of their laws, or of due process of law.

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[7] These limitations will be more fully treated in later chapters. See also the instructive case of Blake v. McClung (172 U. S. 239).

[8] 275 U. S. 274.

[9] McFadden v. Blocker (3 Ind. Terr. 224); Sutton v. Hayes (7 Ark. 462); *In re* Johnson's Estate (139 Calif. 532).

[10] Rev. Stat., Sec. 1978. This provision is from the act of May 31, 1870, passed by Congress in pursuance of its power to enforce the Fourteenth Amendment, and with the obvious purpose of preventing the denial of equal protection of the laws to the negro.

CHAPTER XV

INTERSTATE RELATIONS: EXTRADITION

§ 145. Interstate Extradition.

The Constitution provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he has fled, be delivered up, to be removed to the State having jurisdiction of the crime" (Art. IV, Sec. 2, clause 2).

In the case of Kentucky v. Dennison,[1] decided by the Supreme Court in 1860, the respective powers and duties of the State and Federal Governments in respect of the extradition of criminals came up for adjudication. Congress had passed a law declaring that, upon request from the State from which the fugitive has fled, "it shall be the duty of the executive authority of the State" to cause the fugitive to be seized and delivered to the agent of the demanding State. Dennison, the governor of Ohio, refused the request of the Commonwealth of Kentucky to surrender a fugitive from her borders. Thereupon a mandamus was asked from the Federal court to compel him to do so. This writ, the Supreme Court in a unanimous opinion refused to issue, the position being taken that the obligation imposed upon the governors of the State by the extradition clause is not one which may be enforced by Federal authority.

There have since been a number of occasions upon which the governor of one State has refused the extradition of a person found within its borders and admittedly come from the State which has asked for his return. A notable instance was the refusal of the governor of Indiana to permit the extradition of ex-Governor Taylor of Kentucky who was indicted in the latter State as having been a party to the murder of Governor Goebel.

Though Congress has never attempted to exercise the power, and, therefore, the question has never been tested in the courts, there would seem to be little doubt that a Federal law would be constitutional which would place the matter of the interstate rendition of fugitives from justice in the hands of Federal officials, demand for their surrender having been made by the executive of the States from which they have fled. The provision of the Federal Constitution (Art. IV, Sec. 2, Clause 2) makes no reference to action upon the part of the authorities of the States to which they have fled. It simply says that, upon demand of the executive of the State from whose justice he has fled, the person charged with crime shall be surrendered and removed to that State. This, then, is a Federal obligation, and, in the absence of any negative provision, it would seem clear that Congress has an implied power to provide for its fulfilment through Federal agencies.

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[1] 24 How. 66.

"Upon the executive of the State rests the responsibility of determining, in some legal mode, whether the one claimed is a fugitive from the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State." [2]

The governor cannot be compelled by judicial process, State or Federal, to take action, but, where he has acted, his action may be inquired into by the courts.[3]

§ 146. Auxiliary Legislation by the States.

The power of Congress by legislation to render effective the extradition clause is not exclusive, and does not, therefore, exclude the power of the State to enact measures auxiliary thereto. Indeed, such additional legislation is, in general, necessary, as, for example, laws for inquiring into the fact whether the person demanded was actually, and not constructively, within the State claiming him, when the offense charged was committed.[4]

§ 147. Who Is a "Fugitive."

"To be a fugitive from justice . . . it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found to be within the territory of another." [5]

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[2] *Ex parte* Reggel (114 U. S. 642). See also Pettibone v. Nichols (203 U. S. 192), and Marbles v. Creecy (215 U. S. 63).

[3] Roberts v. Reilly (116 U. S. 80); Hyatt v. New York *ex rel* Corkran (188 U. S. 691).

[4] *Ex parte* McKean (3 Hughes. 23).

[5] Roberts v. Reilly (116 U. S. 80). See also Appleyard v. Mass. (203 U. S. 222); Innes v. Tobin (240 U. S. 127); Taylor v. Taintor (16 Wall. 366). Two recent and interesting cases dealing with actual and constructive presence, see People *ex. rel* Gottschalk v. Brown (237 N. Y. 483) and Keller v. Butler (246 N. Y. 249).

In Hyatt v. New York *ex rel* Corkran,[5a] it was held, without qualification, that, in order to be a "fugitive from justice" within the meaning of the constitutional clause, and of the statutes relating thereto, the person sought to be extradited must have been actually, and not merely constructively, within the demanding State at the time the crime charged was committed. Furthermore, in this case it was held that one who came into the State on business for a single day eight days after the alleged commission of the crime, and months before indictment found, was not, by his departure therefrom, brought within the terms of the statute providing for extradition.

§ 148. Abduction and Forcible Return of Fugitives from Justice.

It has been decided that where a fugitive has been forcibly abducted, without being extradited, from a State to which he has fled to the State from which he had fled, neither the Federal Government, nor the State whose peace has thus been violated, nor the abducted one, has legal redress, unless, indeed, the governor of the State to which he has been taken is willing to return him, and to extradite the persons participating in the abduction.[6]

§ 149. Trial For Offences Other Than Those for Which Extradited.

In United States v. Rauscher[7] was considered the question whether a fugitive extradited from a foreign country in pursuance of a treaty between that country and the United States covering the crime charged, could, after coming into the custody of the United States, be tried upon another minor offence not covered by the treaty. The court held that he could not be.

In Lascelles v. Georgia,[8] however, it was held that, as to fugitives from one State of the Union to another, this may be done.

§ 150. Extradition by the States of the Union to Foreign States.

It was not until 1886, and then by an *obiter dictum*, that the Supreme Court declared that, even in the absence of treaties or acts of Congress on the subject, the extradition of fugitives from justice cannot become a subject for negotiations between a State of the Union and a foreign State. This was declared in United States v. Rauscher.[9]

[5a] 188 U. S. 691.

[6] See the interesting cases of Mahon v. Justice (127 U. S. 700); and Pettibone v. Nichols (203 U. S. 192).

[7] 119 U. S. 407. See also Cosgrove v. Winney (174 U. S. 64).

[8] 148 U. S. 537.

[9] 119 U. S. 407. See the divergent opinions of the Justices of the Supreme Court in the earlier case of Holmes v. Jennison (14 Pet. 540).

§ 151. Fugitive Slaves.

The same section of Article IV which provides for the extradition of fugitives from justice, provides that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This clause is practically obsolete.[10] An elaborate examination of the obligations imposed upon the States, and of the extent of concurrent legislative power in the premises is found in Prigg v. Pennsylvania.[11]

The provision of the Constitution that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808" has, of course, become obsolete.

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[10] The question has been raised whether, since the adoption of the Thirteenth Amendment, the fugitive slave clause of the Constitution has become completely obsolete. It is generally so held, but possibly not correctly so. The clause in question, it will be observed, does not employ the word slaves. Its words are sufficiently broad to make the clause cover not only slaves but minor apprentices and possibly others owing services under contract. Indeed, Charles Sumner in a debate in the United States Senate in 1864 maintained that, properly interpreted, it applied only to such and not to slaves at all. (Congressional Globe, 1st Sess., 38th Cong., Pt. II, pp. 1711, 1750.) The Thirteenth Amendment abolishes not only slavery but all "involuntary servitude," and it has been held that this renders illegal an attempt to compel, upon the part of adults, the performance of any personal services, whether provided for by contract and already compensated for, or not. Of course, however, damages for breach of contract to render personal services, may be awarded. But this does not render illegal State laws compelling the performance of personal services on the part of minor apprentices, and if this be so, it would seem that a minor apprentice escaping from a State where his services may be compelled, into another State, under a proper law for the purpose, be claimed and removed to the State from which he fled. The subject of peonage will be considered in a later chapter.

[11] 16 Pet. 539. For an able discussion of the constitutionality of the Federal Fugitive Slave Act of 1850, see the article by Professor Allen Johnson, "The Constitutionality of the Fugitive Slave Acts" in *Yale Law Journal*, December, 1921.

CHAPTER XVI

AGREEMENTS BETWEEN THE STATES, BETWEEN THE STATES AND FOREIGN POWERS, AND BETWEEN THE STATES AND THE UNITED STATES

§ 152. Individual States and Foreign Powers.

As is elsewhere shown, the control of foreign relations is exclusively vested in the Federal Government. From this it necessarily follows that the States have no authority to enter into any political relations with foreign Powers. From what is, therefore, an excess of caution the Constitution expressly declares that "no State shall enter into any treaty, alliance, or confederation." However, in a later clause of the same section the possibility of the States entering into direct relations with foreign Powers, provided the consent of Congress is obtained, is recognized, at least as regards certain but undefined agreements or compacts. The constitutional provision reads: "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State, or with a foreign Power."

There have been few instances in which the States have sought, with or without the consent of Congress, to enter into agreements with foreign States, and there are therefore few cases in which the courts have been called upon to determine what kinds of agreements may thus, with congressional approval, be entered into between the States and foreign States. However, as will presently be seen, there have been many instances in which the States have entered into agreements with one another, and, from the judicial decisions arising thereunder, it is clear that these permissible agreements or compacts do not include any that are of political significance.[1]

Arrangements partaking more or less of a contractual character between the individual States of the Union and the Union itself have been frequently entered into. The greater number of these compacts have been made at the times the States parties to them were admitted to the Union as States, and their effect, or at least their attempted effect, was to place such States under limitations not directly deducible from the Federal Constitution, and thus, to such extent, to violate the general constitutional principle of the equality of States. This principle, it may be said, is not expressly stated in the Federal Constitution, but would seem to be implied in the general nature of that instrument.

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[1] As regards agreements with foreign States, see the discussion in Holmes v. Jennison (14 Pet. 540); as regards compacts between States of the Union, see Virginia v. Tennessee (148 U. S. 503).

The Constitution, without distinguishing between the original and new States, defines the political privileges which the States are to enjoy, and declares that all powers not granted to the United States shall be considered as reserved "to the States." From this it almost irresistibly follows that Congress has not the right to provide that certain members of the Union, possessing full statehood, shall have their constitutional competences less than those of their sister States. According to this, then, though Congress may exact of Territories whatever conditions it sees fit as requirements precedent to their admission as States, when admitted as such, it cannot deny to them any of the privileges and immunities which the other Commonwealths enjoy.

It would seem that as regards the enforcibility of these contracts, a distinction is to be made between those that attempt to place the State under political restrictions not imposed upon all the States of the Union by the Federal Constitution, and those which seek the future regulation of private, proprietary interests.

The first class of these agreements the Supreme Court has repeatedly held are not enforcible against the State after it has been admitted into the Union.[2]

As to contracts between the States and the Union at the time of their admission to the Union as States and involving proprietary interests, the Supreme Court has held them to be of continuing validity and, therefore, enforcible.[3]

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[2] Pollard v. Hagan (3 How. 212); Escanaba & Lake Michigan Transportation Co. v. Chicago (107 U. S. 678); Bolln v. Nebraska (176 U. S. 83); Coyle v. Smith (221 U. S. 559); *Ex parte* Webb (225 U. S. 663).

[3] Stearns v. Minnesota (179 U. S. 223). For a concrete instance of a compact between two states with the consent of Congress, see Olin v. Kitzmiller (259 U. S. 260). As to a right acquired by long continued possession, apparently without the consent of Congress, see Michigan v. Wisconsin (270 U. S. 295).

CHAPTER XVII

THE PERSONS SUBJECT TO THE JURISDICTION OF THE UNITED STATES: STATUS OF ALIENS

§ 153. Territorial Sovereignty.

By international law and by the public law of all civilized States the legal jurisdiction of a State is recognized to extend over all persons for the time being within the districts under its *de facto* control. The only exceptions, if exceptions they be, are those coming within the principle of extraterritoriality. A State has jurisdiction over not only its native-born and naturalized subjects, but all the subjects of other States permanently or, at any given time, temporarily resident, within its borders.[1]

§ 154. Status of Aliens.

As regards the status of aliens, that is, citizens of other States, who are temporarily or permanently domiciled within a State, it may be said that the fact that they are within its territorial limits makes them, in a broad constitutional sense, members of that State and, therefore, subject to the authority of its laws, though they still remain the subjects or citizens of their native States. In fact, being under the protection of the State where they are, they owe an allegiance to it according to the maxim *protectio trahit subjectionem, et subjectio protectionem.*[2]

It has been said that a State has absolute legal authority over all persons within its territorial jurisdiction, and over its own citizens wherever they may be. In the exercise, however, of this authority over persons within its territorial limits who are claimed as citizens by other States, that is, over resident aliens, or naturalized citizens whose native States do not recognize the right of expatriation, this legal power, though not subject to legal limitation, is actually subject to certain limitations which international custom has created. Thus each State demands that its citizens, when abroad, receive due protection of life and property, and that they be not unduly discriminated against by the foreign State in which they may happen to be. Also, States do not permit the foreign

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[1] For a general discussion of the principle of territorial sovereignty, see the case of The Exchange (7 Cr. 116). For the effects of *de facto* control, see United States v. Rice (4 Wh. 246).

[2] *Cf.* Webster's report on Thrasher's case, *Works*, VI, 526. See, also, Carlisle v. United States (16 Wall. 147); United States v. Wong Kim Ark (169 U. S. 649).

States to require from their subjects the performance of duties, as, for example, service in its army, that may properly be required only of citizens. Resident aliens may indeed be required to lend their assistance, by service in the militia and police forces, or in a *posse comitatus*, to put down domestic disorder; for, enjoying the protection of the local law, they may fairly be required to aid in overcoming resistance to its enforcement. But they may not be compelled to serve in the national military forces in times of public war.

A distinction is made in practically all countries between domiciled and non-domiciled aliens, with reference to the legal burdens that may be imposed upon them and the civil and political rights that they may enjoy.

An alien becomes domiciled in a particular place when he takes up his residence there with an intention to remain for an indefinite length of time (*animo manendi*). When so domiciled, all matters other than political, which relate to his personal status, are regulated by the *lex domicilii*. Thus the local law governs his power to enter into contracts, regulates succession to personal property, and the validity of wills with reference thereto, and, in the United States, England, and many of her dependencies, determines the validity of marriages.

Domicile is immediately fixed when residence is taken up with the intent to remain for an indefinite time.[3]

An alien passing through the United States, or for any purpose only temporarily in the country, is held fully subject to local criminal law. He is also able to enter into civil contracts which may be enforced against him to the extent of any property that he may have within the United States.

§ 155. Exclusion and Expulsion of Aliens.

All countries have, according to the principles of international law, the right to determine for themselves whether or not they will admit aliens within their borders, or whether they will admit some and exclude others. Furthermore, after admission, aliens, whether domiciled or not, may remain only so long as the State where they are may see fit to permit them to do so. The arbitrary, oppressive, or opprobrious exercise of these rights may give rise to just ground of complaint upon the part of the States whose subjects are thereby injured or discriminated against. But the existence of the right of an independent State to determine for itself whom it will receive or allow to remain within its borders, cannot be questioned.[4]

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[3] The Venus (8 Cr. 253).

[4] Chae Chan Ping v. United States (130 U. S. 581).

In proceedings for deportation of an alien for causes arising subsequent to entry into the United States, it is immaterial whether or not the original entry was lawful. Nor does a declaration of an intention to seek American citizenship operate to preclude deportation based upon causes arising after entry.[5]

§ 156. Protection of the Persons and Property of Aliens.

Aliens are, by the general doctrines of public law, entitled to the same protection of persons and property that is enjoyed by the citizens of the State in which they are resident. In all cases, when injured, the same means of redress that are open to citizens must be given to them. But they are, of international right, entitled to no special privileges in these respects.[6]

Various constitutional questions which have arisen with reference to the rights of Japanese aliens in the United States will be described in Section 325 dealing with the Treaty-Making Power of the United States.

As to the exclusion from entrance into the United States of Hindus British Indians, and Asiatics, see the Act of Congress of February 5, 1917.[7] Generally, as to the limitations placed by statute upon entrance, of aliens into the United States see the various Immigration Acts of Congress.

The same principles of constitutional and international law which support the right of the United States to exclude aliens support its right to deport or expel them when occasion demands.

The extent to which conclusive effect may constitutionally be granted to the determination of administrative officials with reference to the exclusion or expulsion of aliens will receive consideration in a later chapter. It is, however, proper to say here that, while executive or administrative, as distinguished from judicial, proceedings are held constitutionally adequate as regards aliens, the situation is a different one when the party desiring to enter claims, and shows that his claim is not a frivolous one, to be a citizen of the United States. In such a case, a writ will be allowed by means of which the party may obtain a judicial determination of his claim to citizenship. This was very clearly determined in the important case of Ng Fung Ho v. White.[8]

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[5] United States *ex rel.* Claussen v. Day (279 U. S. 398).

That this power of exclusion may be exercised through administrative officers without judicial intervention, see Chapter LXXVII of this treatise. The leading cases are: Ekiu v. United States (142 U. S. 651); Fong Yue Ting v. United States (149 U. S. 698); Lem Moon Sing v. United States (158 U. S. 538); Turner v. Williams (194 U. S. 279); United States v. Ju Toy, (198 U. S. 253); Chin Low v. United States (208 U. S. 8).

[6] See Moore, *Digest of International Law,* IV, 534, and authorities there cited. For a discussion of the constitutional and international questions arising out of injuries to resident aliens, see the author's larger treatise, § 188, and also the monograph by J. I. Chamberlain, *The Position of the Federal Government of the United States in Regard to Crimes Committed Against Subjects of a Foreign Nation Within the States.* Reports of the American Bar Assn. for 1891, 1892, 1893, and Proceedings of the Am. Soc. of International Law, 1908.

[7] 39 Stat. at L. 874. Cf. United States v. Bhagat Singh Thind (261 U. S. 204)

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[8] 259 U. S. 276. See also United States v. Tod (263 U. S. 149); United States v. Ju Toy (198 U. S. 253); Chin Low v. United States (208 U. S. 8); Gegiow v. Uhl (239 U. S. 3).

CHAPTER XVIII

AMERICAN CITIZENSHIP

§ 157. Citizenship Defined.

The citizen or subject body of a State, regarded from the point of view of other States, that is, from the point of view of international law, constitutes one homogeneous body, all the members of which have the same status, the same rights and duties. Considered, however, from the point of view of the constitutional or municipal law of the State in question, they may be grouped into distinct classes, with differing public and private rights. Thus it is that in the constitutional jurisprudence of the United States are to be found at present not only a distinction between Federal and State citizens, but, within the class of Federal citizens (as including all those persons subject to the full sovereignty of the United States) a distinction between those who are "citizens of the United States" according to the meaning of the phrase as used in the Constitution of the United States, and those, who, though subjects of the United States, are not citizens within this narrower constitutional sense.[1]

As adopted, the Federal Constitution contained no definition of citizenship. Impliedly, however, it recognized a State citizenship in that clause which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It would also seem to have recognized a Federal citizenship in the clauses providing that the President shall be "a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution"; that Senators and Representatives shall have been nine and seven years respectively citizens "of the United States"; and that Congress shall have the power to pass laws regulating the naturalization of aliens.

There has never been any question as to the existence under the Constitution of a distinction between State and Federal citizenship. The only dispute has been as to the relationship of the two. Prior to the argument of the Dred Scott case [2] there was surprisingly little discussion of this point. The opinion generally held seems, however, to have been that every citizen of a State was a citizen of the United States.

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[1] In the opinions rendered in the case of Minor v. Happersett (21 Wall. 162), is to be found a general discussion of the subject of citizenship, and a specific argument that the right to vote is not a necessary incident of citizenship. See also a valuable congressional report on citizenship, H. R. Doc. 326, 59th Cong., 2d Session.

[2] Scott v. Sandford (19 How. 393).

In effect, the Dred Scott decision held that native-born negroes, whether free or slave, living in the United States, though subjects of, that is, owing allegiance to, the United States, were not, and could not, by either State or Federal action, be made "citizens" of the United States within the meaning of the Constitution.

§ 158. The Fourteenth Amendment.

In 1868 was adopted the Fourteenth Amendment which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The two main purposes of this declaration undoubtedly were: (1) The assertion that national citizenship is primary and paramount to State citizenship, and (2), the granting of both National and State citizenship to the negro. That National citizenship was to be paramount was shown not only in the words just quoted, but in the further provision of the amendment that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the Slaughter House cases,[3] as we have already learned, the Supreme Court held, in effect, that this amendment did not have the effect of absorbing State citizenship and its appurtenant rights into the National citizenship, but that the two remain as distinct as before. Upon this point the court declared that the clause defining citizenship provides that "persons may be citizens of the United States without regard to the citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States."

Since the adoption of the Fourteenth Amendment there has been no question that all persons (including negroes) born or naturalized in the United States become by mere residence in a State citizens of the State. Furthermore there is, and has been, no question that, as Taney says in his opinion in the Dred Scott case, a State cannot, by granting its citizenship to an alien, give him Federal citizenship or endow him with any of the privileges appertaining to that status, for the right of naturalization is, as will be seen, vested exclusively in the Federal Government.

Inhabitants of the District of Columbia and of a Territory are not citizens of a State within the meaning of the Constitution. They are, however, of course, citizens of the United States.[4]

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[3] 16 Wall. 36.

[4] Hepburn v. Ellzey (2 Cr. 445); American Insurance Co. v. Canter (1 Pet. 511).

§ 159. Wong Kim Ark Case.

In the case of United States v. Wong Kim Ark,[5] decided in 1898, the Supreme Court was called upon to determine whether, under the terms of the Fourteenth Amendment, persons born in the United States of alien parents, are citizens of the United States. In this case the question was as to the citizenship of a child of Chinese parents who not only were not citizens of the United States, but could not, under the existing laws, become such by naturalization. In sustaining Ark's citizenship the court held that the clause of the Amendment declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," is but declaratory of the common-law principle unreservedly accepted in England since Calvin's case (the case of Postnati, decided in 1608) and in the United States since the Declaration of Independence, that all persons, irrespective of the nationality of their parents, born within the territorial limits of a State, are, *ipso facto*, citizens of that State. The court admitted that the principle of the Roman law according to which the citizenship follows that of the parent, irrespective of the place of birth, has been accepted by certain of the European nations, but denied that this principle had become a true and universal rule of international law, or, if it had, that it had superseded the rule of the common law.

The acceptance of the foregoing doctrine, it was held, does not prevent the United States from providing that children born abroad of American citizens shall be considered citizens of the United States.

§ 160. Deprivation of Citizenship.

Congress has provided that in certain cases, as, for example, desertion from the military or naval forces of the United States or avoiding draft into such services, citizens of the United States shall be deemed to have forfeited their rights of citizenship. It would appear that this forfeiture of the "rights of citizenship" is not equivalent to the forfeiture of citizenship itself, for, though the rights are lost, the obligations are not destroyed.

Congress has furthermore provided that American citizenship may be lost by an American woman marrying a foreigner, and also that, in certain cases, naturalized citizens may be presumed to have abandoned their American citizenship, as, for example, by returning to their native countries and residing there for certain periods of time.[6]

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[5] 169 U. S. 649.

[6] See MacKenzie v. Hare (239 U. S. 299). Since the enactment of the Married Woman's Naturalization Act of September 22, 1922 (42 Stat. at L. 1021), an American woman does not necessarily lose her American citizenship by marriage to an alien.

CHAPTER XIX

NATURALIZATION AND EXPATRIATION

§ 161. Naturalization by Statute.

Each country determines, by its own municipal law, the persons to be admitted to its citizenship.

Since the adoption of the Constitution it has been recognized that citizenship of the United States may be obtained in two ways—by birth within the country, and by naturalization. As has been already learned, up to the time of the Dred Scott decision there was doubt whether birth within the United States or naturalization by the General Government was sufficient to endow one with either Federal or State citizenship. By that decision this doubt was resolved in the negative, it being held that no one by mere birth became a citizen of the United States, and that one could become a Federal citizen only by becoming first a citizen of a State, though it was also held, it will be remembered, that a State could not, by making an African negro one of its own citizens, thereby endow him with the general constitutional privileges of Federal citizenship. By the Fourteenth Amendment, however, it was declared that National citizenship is no longer dependent upon State citizenship, and that mere birth within the United States, even though of alien parents, or naturalization by Federal law, is sufficient to create National citizenship; and that residence in a State is sufficient to render such a one a citizen of that State.

We thus see that the power given to Congress by Article I, Section 8, Clause 4, of the Constitution "to establish an uniform rule of naturalization" is not to be construed, as was once alleged, as simply a power to remove the disabilities of foreign birth, leaving it to the States to determine whether or not, when such disabilities are removed, the individual shall become a citizen of the State where he resides, and thereby a citizen of the United States in the full constitutional sense of the term; but that it is a full complete power on the part of Congress to provide for the creation of Federal citizens by the naturalization of persons of foreign birth. With the exception of a few early cases[1] there has never been any question but that the power of naturalization, whatever its scope, is vested exclusively in Congress. The cases holding this from the time of

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[1] See especially Collet v. Collet (2 Dall. 294).

Chirac v. Chirac[2] to United States v. Wong Kim Ark[3] are too numerous to cite.[4]

It lies within the legislative discretion of Congress to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of persons to whom the right will be extended; but, as was said in the Wong Kim Ark case, not to limit the civil and political rights of naturalized citizens beyond the limits provided for in the Constitution.

Except as limited by the Constitution it is within the power of Congress to determine the civil and political rights which naturalized citizens shall enjoy, and to make these rights less than those possessed by natural-born subjects. The due process of law clause of the Fifth Amendment, however, would prevent any very great discrimination as to their civil rights, and this limitation is reinforced by the obligations of international comity. The Constitution itself provides that only a natural-born citizen shall be eligible to the Presidency,[5] or to the Vice-Presidency.[6]

When territories are annexed either by treaty or by conquest, the status of their inhabitants is determined at the will of the annexing States. In all cases, however, in the absence of any treaty stipulations to the contrary, the annexation of a territory transfers to the annexing State the allegiance of its inhabitants, and makes them, from the viewpoint of other nations, the citizens of that State. Whether or not, however, they become its citizens in the stricter constitutional sense depends upon the municipal law of that country. This branch of the subject will be treated in the chapter dealing with "Citizenship in the Territories and Dependencies."

Besides naturalization by general acts, by treaty, and by conquest, there have been many instances in the United States of naturalization of specific individuals or groups of individuals by special acts of Congress.[7]

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[2] 2 Wh. 259.

[3] 169 U. S. 649.

[4] For an excellent statement of the exclusiveness of the Federal power, see Taney's opinion in Scott v. Sandford (19 How. 393).

[5] Art. II, Sec. 1, Cl. 5.

[6] Twelfth Amendment.

[7] *Cf.* Van Dyne, *Citizenship of the United States*, Chapter VI. See the same work, Chapter VI, for questions of citizenship connected with the admission of Territories as States, and also Boyd v. Nebraska (143 U. S. 135). In this case the court said: "Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community. So far as the original States were concerned, all of those who were citizens of such States became upon the formation of the Union citizens of the United States, and upon the admission of Nebraska into the Union 'upon an equal footing with the original States, in all respects whatsoever,' the citizens of what had been the Territory became citizens of the United States and of the State."

Congress has provided by statute that all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are to be considered citizens of the United States; but that the rights of citizenship shall not descend to children whose fathers have never resided in the United States.

The application of this principle to persons born in countries which, like the United States, claim as their own citizens all persons born within their limits, is to create a double citizenship.

Most European countries apply the doctrine of *jus sanguinis* in fixing citizenship. That is, they treat as their own citizens persons wherever born, whose parents are their citizens. In some cases also, they apply the *jus soli* as well, claiming as their own citizens persons born upon their soil of alien parents. This, for example, is the practice of France. Many States permit after majority an election to one born in one country of parents who are citizens of another; for example, France, Spain, Belgium, Greece, Bolivia, Italy, Portugal, Mexico, and Great Britain. The British act of 1870 declares that "any person who is born out of Her Majesty's dominions, of a father being a British subject, may, if of full age, and not under any disability, make a declaration of alienage, . . . and, from and after the making of such declaration, shall cease to be a British subject." In default of such declaration he remains, by birth, a British subject.

Double citizenship is also created, as we shall see, in those cases in which one country naturalizes the citizens of another country which does not admit the right of the individual to expatriate himself without the consent of the State of his natural allegiance.

The difficulties and conflicting claims arising out of these cases of double allegiance have been numerous, and have usually been settled, each case upon its own merits, by way of compromise and upon doctrines of comity, rather than by the establishment of any very general principles. Thus it has been held upon numerous occasions by the executive branch of our government that our law cannot operate to relieve such persons from their allegiance to the countries in which they are born so long as they remain in such countries. It has also been generally held that where a naturalized American citizen returns to his native country, he may be held bound by such obligations, as, for example, the rendition of military service, as may have been due by him at the time of his departure from his native country.

The determination of the conditions under which naturalization shall be extended and the persons eligible for such naturalization is a legislative act.

However, the granting or withholding of naturalization has been held to be sufficiently judicial in character to warrant its being exercised by the courts, where, by statute, it has been placed by Congress. At the same time, the proceedings thus provided for are not of that judicial character which require that the doctrine of *res judicata* applies to the conclusions reached. Thus, it has been held that a certificate of naturalization, though secured from a competent court, is not conclusive as against the public so as to prevent its cancellation, on the ground of fraud, or illegally procured perjured testimony, as authorized by United States statute.[8] In Johannessen v. United States,[9] in a proceeding instituted by the United States under this statute, the court upheld its constitutionality, and, in the course of its opinion, pointed out that the foundation of the doctrine of estoppel by judgment, is that both parties have had their day in court, and therefore that it did not apply to naturalization proceedings which, though judicial in character, are not proceedings in which the Government appears as an adversary to the petitioner.

It would appear, however, that when, at the time naturalization is sought, the Federal authorities have intervened and opposed the granting of citizenship, but that, notwithstanding this, naturalization has been granted, the doctrine of *res judicata* applies, both parties having had their day in court.[10]

Although the determination of the conditions under which citizenship by naturalization may be obtained is a legislative matter, and the granting of citizenship in conformity with such legislative policy is a judicial matter, there are administrative matters in connection with naturalization proceedings for the performance of which the Federal Government has found it desirable to establish in the Department of Labor a distinct service known as the Bureau of Naturalization. This Bureau "is charged with administrative supervision of the laws concerning the preparation and training of all alien-born applicants for citizenship and their admission to citizenship. It exercises a control of the process of admission to citizenship by representing the Government at the judicial hearings of naturalization proceedings of applicants for citizenship. It keeps the necessary records pertinent thereto, furnishes information to aliens and others regarding the status, rights, and obligations of citizens, and cooperates in the work of citizenship training by public schools throughout the United States." [11]

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[8] 34 Stat. at L. 596, 601. Act of June 29, 1906.

[9] 225 U. S. 227. See also Luria v. United States (231 U. S. 9).

[10] United States v. Pandit (15 Fed. [2d.] 285, 273 U. S. 759). *Cf.* Gokhale v. United States (278 U. S. 591, 662).

[11] This statement is taken from the volume, *The Bureau of Naturalization*, published by the Institute for Government Research. In Chapter I of this monograph will be found a brief history and the text of the Naturalization laws of the United States.

Congress may authorize, and, for many years, did authorize, State courts to entertain naturalization proceedings, but there is, of course, no power on the part of the Federal Government to compel the exercise by such State courts of the power so granted.

§ 162. Who May Be Naturalized.

Since the first years of the Government Congress has provided for the naturalization of "free white persons," and this provision was not changed until the act of 1870 extended the right "to aliens of African Nativity and to persons of African Descent," and this remains the law at the present time.

Indians have been held not to be included in the above classes, and, therefore, they have been eligible for naturalization only under special statutes. The constitutional status of Indians in the United States is discussed in a later chapter,[12] but it may be here said that, by the act of June 2, 1924,[13] it is provided that "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States."

The Chinese have been held to be not included within the classes of free white persons or negroes or persons of African descent, and, therefore, not eligible to citizenship.[14] Because thus ineligible, it has been held that a Chinese woman does not become a citizen of the United States by reason of marriage to an American citizen.[15]

For the same reasons that Chinese have been held not eligible to American citizenship the Japanese have been denied naturalization. This was held in 1894, in *Re* Saito,[16] and has since been reaffirmed by the Supreme Court in Takao Ozawa v. United States,[17] and in Toyota v. United States.[18]

The most careful examination by the Supreme Court of the meaning to be given to the term "white persons" is that contained in the opinion in the case of United States v. Bhagat Singh Thind,[19] in which it was held that a high-caste Hindu is not a "white person" within the meaning of the Naturalization Act.

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[12] Chapter XX.

[13] 43 Stat. at L. 253.

[14] See *In re* Ah Yup (5 Sawy. 155), in which this was held and which has not since been questioned.

[15] Chang Chan *et al.* v. Nagle (268 U. S. 346).

[16] 62 Fed. 126.

[17] 260 U. S. 178. Reaffirmed in Yamashita v. Hinkle (260 U. S. 199).

[18] 268 U. S. 402.

[19] 261 U. S. 204. See also United States v. Pandit (15 Fed. [2d.] 285); Gokhale v. United States (278 U. S. 591, 662).

In *Re* Po,[20] it was held that a native of British Burma was a Malay, and, therefore, not a "white person," and not entitled to become naturalized.

In the lower Federal courts it has been held that Parsees, Syrians, Armenians, Mexicans, come within the class of "white persons," and, as such, are eligible to citizenship.[21]

Since the act of Congress of 1798, aliens, being natives, citizens or denizens of a country with which the United States is at war, are not eligible to naturalization as American citizens.

By act of May 26, 1926,[22] it was provided that an alien veteran of the World War, if residing in the United States, should be entitled, at any time within two years after the enactment of the law, to naturalization upon the same terms, conditions and exceptions which would have been accorded to such alien if he had petitioned before the Armistice of 1918, except that he would not be required to appear and file his petition in person and to take the prescribed oath of allegiance in open court.

§ 163. Inhabitants of Dependencies of the United States.

As will elsewhere appear, the United States may have sovereignty over areas which, however, are not "incorporated" into the United States. The natives or citizens of these unincorporated areas are nationals or subjects of the United States when viewed in a broad international sense, but they are not necessarily "citizens" of the United States within the narrower sense of American constitutional or statute law. This has been specifically held as to the inhabitants of these dependencies at the time of their annexation to the United States, and with regard to which at the time of annexation express provision was not made that such inhabitants should become citizens of the United States. By a parity of reasoning, it would appear that persons born in such annexed areas after the date of their annexation do not become, by the operation of the Fourteenth Amendment, citizens of the United States, for, though born subject to the jurisdiction of the United States, they are not born "in the United States."

§ 164. Filipinos.

The treaty of peace which transferred the sovereignty over the Philippine Islands from Spain to the United States did not provide for the collective naturalization as American citizens of the inhabitants of those

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[20] 28 N. Y. Supp. 383.

[21] *In re* Rodriguez (81 Fed. 337); *In re* Halladjian (174 Fed. 834); United States v. Balsara (180 Fed. 694); *In re* Mudarri (176 Fed. 465); *In re* Kanaka Nian (6 Utah, 359); *In re* Camille (6 Fed. 256).

[22] 44 Stat. at L. 655.

Islands. As is pointed out in the next section, the citizens of Porto Rico have since been made American citizens by act of Congress. This, however, has not been done with reference to the Filipinos who, therefore, remain citizens of the Philippine Islands, and not American citizens except in a broad international sense. However, by Section 30 of the act of Congress of June 29, 1906, provision is made for the naturalization of persons owing permanent allegiance to the United States, and, though there has been some difference of judicial opinion, it would appear that Filipinos may be naturalized under this provision.[23]

§ 165. Porto Ricans.

The treaty of peace with Spain of 1898, which provided for the transfer of the sovereignty over Porto Rico and the Philippine Islands to the United States did not provide for the collective naturalization of the inhabitants, but, instead, merely provided that Spanish subjects, natives of Spain, residing in these Islands, might preserve their allegiance to the Crown of Spain by making a declaration within a year of their desire to preserve such allegiance, in default of which declaration they were to be held to have renounced it and to have adopted the "nationality of the territory in which they may reside," and that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." It was later judicially held, as elsewhere appears, that these natives of the Islands and those native Spaniards, inhabitants of the Islands who did not preserve their Spanish nationality, became citizens of Porto Rico or citizens of the Philippine Islands, as the case might be, but not citizens of the United States except as regarded from the international point of view.

By act of Congress of March 2, 1917,[24] it was provided that Porto Rican citizens were to be deemed United States citizens. They were thus collectively naturalized by statute.

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[23] See especially *In re* Bautista (245 Fed. 765). *Cf.* also, Malcolm, *Philippine Constitutional Law* (2d ed.), p. 397. Section 30 of the act of 1906 reads: "All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law." 34 Stat. at L. 596.

[24] 39 Stat. at L. 953, Sec. 5. See also act of March 4, 1927, as to persons born in Porto Rico of alien parents. 44 Stat. at L. 1418.

§ 166. Hawaiians.

The Hawaiian Islands came under the sovereignty of the United States by the Joint Resolution of Congress of July 7, 1898.[25] This Resolution made no mention as to the status to be enjoyed by inhabitants of the Islands. By act of April 30, 1902,[26] the Islands were declared to constitute the Territory of Hawaii, and the declaration made (Section 4) "That all persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

§ 167. Virgin Islands, Inhabitants of.

By act of February 25, 1927, the following persons and their children born subsequent to January 17, 1917, are declared to be citizens of the United States: "(a) All former Danish citizens who, on January 17, 1917, resided in the Virgin Islands of the United States and are now residing in those islands or in the United States or Porto Rico, and who did not make the declaration required to preserve their Danish citizenship by article 6 of the treaty entered into on August 4, 1916, between the United States and Denmark, or who, having made such a declaration, have heretofore renounced or may hereafter renounce it by a declaration before a court of record:

"(b) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands, and are now residing in those islands or in the United States or Porto Rico, and who are not citizens or subjects of any foreign country; and

"(c) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and are now residing in the Virgin Islands of the United States, and who are not citizens or subjects of any foreign country."

The same act also provides: "All persons, born in the Virgin Islands of the United States on or after January 17, 1917 (whether before or after the effective date of this Act), and subject to the jurisdiction of the United States, are hereby declared to be citizens of the United States."[27]

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[25] 30 Stat. at L. 750.

[26] 31 Stat. at L. 141.

[27] Article 6 of the Treaty with Denmark under which the Virgin Islands were acquired by the United States provided that those Danish citizens residing and remaining in the Islands might preserve their Danish citizenship by making before a court of record, within one year from the exchange of ratifications of the treaty a declaration of their decision to preserve such citizenship; in default of which declaration they were to be deemed to have renounced it and to have accepted American citizenship. For children under eighteen years of age this declaration could be made by their parents. It was, however, further provided: "Such election of Danish citizenship shall however not, after the elapse of the said term of one year, be a bar to their renuncia-

§ 168. American Women Marrying Foreigners, and Foreign Women Marrying American Citizens.

By the act of March 2, 1907, it was provided that American women marrying foreigners should take the nationality of their husbands, but that, at the termination of the marital relation, they might resume their American citizenship, if abroad, by registering as such with a consul of the United States, or, if residing in the United States at the time of the termination of the marital relation, by continuing to reside therein. The act also provided (Section 4) that foreign women who acquired American citizenship by marriage with American citizens, should be assumed to retain this citizenship after the termination of the marital relation, if they continued to reside in the United States, unless they should make formal renunciation thereof; or, if residing abroad, that they might retain this citizenship by registering as such before a United States consul within one year after the termination of the marital relation. The Sections 3 and 4 of the act of 1907 were repealed by the act of September 29, 1922.

By this act of September 22, 1922, entitled "An Act Relative to the Naturalization and Citizenship of Married Women" (1) it is provided that the right of a woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman; that any woman marrying a citizen of the United States, or any woman whose husband is naturalized after the passage of the act, shall not become a citizen of the United States by reason of such marriage or naturalization, but, if eligible to naturalization, she may be naturalized by complying with all requirements of naturalization law, except that no declaration of intention is to be required, and, in lieu of the requirement of five years of residence in the United States and one year of residence in the State where the naturalization court is held, one year's continuous residence in the United States, Hawaii, Alaska, or Porto Rico will be sufficient; that a woman of American citizenship shall not lose her citizenship by reason of her marriage, after the passage of the act, unless she makes formal renunciation thereof; provided, however, that one marrying an alien ineligible to American citizenship shall lose her citizenship; that if, at the termination of the marital status, a woman is an American citizen, she shall retain her citizenship regardless of her residence; that if, during the continuance of the marital status she resides

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tion of their preserved Danish citizenship and their election of citizenship in the United States and admission to the nationality thereof on the same terms as may be provided according to the laws of the United States, for other inhabitants of its Islands. The civil rights and the political status of the inhabitants of the Islands shall be determined by Congress, subject to the stipulations contained in the present Convention."

continuously two years in a foreign State of which her husband is a citizen, or for five years continuously outside the United States, she shall come under the same presumption as that provided for naturalized citizens of the United States by Section 2 of the act of 1907. No woman whose husband is not eligible to citizenship may be naturalized during the continuance of the marital status.

§ 169. Children.

The act of 1907 provides that children born outside the United States of alien parents are to be deemed citizens of the United States by virtue of the naturalization of, or the resumption of American citizenship by the parent, provided such naturalization or resumption takes place during the minority of the children, and, provided further, that such citizenship of a minor child should begin at the time when such child begins to reside permanently in the United States.

The act of 1907 also provided that:

"All children born outside the limits of the United States who are citizens thereof in accordance with the provisions of Section 1993 of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take an oath of allegiance to the United States upon attaining their majority."

§ 170. Expatriation.

Until comparatively recent times, except in the United States, the right of a citizen to cast off his natural allegiance, the allegiance into which he is born, was generally denied by the States of the world. This denial was made, but not always enforced in practice, in England down to the time of her Naturalization Act of 1870.

Since the first years of the Constitution the legislation of Congress upon the subject of naturalization has implied the right of expatriation. By the act of 1868, which is still in force, the right of expatriation was explicitly declared in the most unqualified manner.

The enforcement, or rather the attempted enforcement, of this legislative declaration has led the diplomatic branch of our government into many difficulties. With reference to a considerable number of countries these difficulties have in a great measure been obviated by the negotiation with them of naturalization treaties.

Judicial decisions in the United States as to the existence of a right of expatriation in the absence of statutes creating it have not been uniform.[28]

The United States has suffered considerably from the practice of foreigners obtaining American citizenship by naturalization but without any *bona fide* intention of remaining permanently in the United States. In other words, after obtaining American citizenship, these persons have, in many cases, taken up foreign residence and, nevertheless, continued to claim the benefits of their acquired American citizenship. Especially has this procedure been resorted to by aliens in order to escape from their liability to service in the armies of the countries of their original citizenship.

By Section 15 of the Naturalization Act of June 29, 1906, Congress provided: "If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdiction who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship." [29]

By act of March 2, 1907,[30] Congress for the first time provided a statutory mode of throwing off one's American citizenship. Section 2 of that act provides: "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he has taken an oath of allegiance to any foreign State. When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an

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[28] Talbot v. Janson (3 Dall. 133); Inglis v. Sailor's Snug Harbor (3 Pet. 99); M'Ilvaine v. Coxe (2 Cr. 280). See also Moore's *Digest of International Law*, III, § 433.

[29] For a construction of this provision, see the opinion of Mr. Justice Van Devanter in the case of Luria v. United States (231 U. S. 9).

[30] 34 Stat. at L. 1228.

American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war." [31]

In a number of treaties to which the United States is a party it is provided that, when naturalized citizens, originally citizens of the other party States, return to the States of their original citizenship, *animo manendi*, they lose their naturalized citizenship, and, in most cases, it is provided that a residence of two years of such foreign residence shall be deemed prima facie evidence of this intention to remain abroad.

What has been said in the preceding sections has had reference to the right of a citizen, by voluntary action upon his part, to expatriate himself. The law is clear that, whatever this right may be, it is subject to full control by the Government, both affirmatively and negatively. That is, the Government may provide that certain acts upon the part of the citizen may be punished by a denial to him or her thenceforth of the rights and privileges of American citizenship, or may be deemed to operate as renunciation of his or her American citizenship. This has appeared in the preceding chapter which has dealt with American citizenship. Furthermore, it is established that no one may abandon his or her American citizenship without the consent of the Government. In the early case of Shanks v. Dupont [32] this doctrine was declared and has not since been questioned. In that case the court said: "The general doctrine is, that no persons can by any act of their own, without the consent of the Government, put off their allegiance, and become aliens." In other words, the Government has the same control over the denial of a continuance of citizenship that it has over the creation or recognition of that status.[33]

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[31] The second paragraph of this section gave statutory effect to a practice which the Department of State had, in fact, followed for many years. As to this whole subject, see two excellent articles by R. W. Flournoy, Jr., Assistant Solicitor for the Department of State, entitled "Naturalization and Expatriation" in 3 *Yale Law Journal* (1921–1922), pp. 702, 848.

[32] 3 Pet. 242.

[33] *Cf.* MacKenzie v. Hare (239 U. S. 299).

CHAPTER XX

THE LEGAL STATUS OF INDIANS

§ 171. Indian Lands.

The legal relations of the Indians to the various governments established by their white conquerors have had reference, broadly speaking: (1) to their rights to the lands occupied by them; and (2) to their political status either as tribes or individuals.

With reference to the title possessed by Indians in the lands occupied or hunted over by them, the principle was from the first applied by the white settlers that by discovery and occupation the title in fee to all the lands thus taken possession of became vested in the sovereign of the State under whose authority the conquest was made.

The principle that the original title to all the land within a State is in the sovereign of that State, and that by grant from him all individual titles are obtained, was the feudal one which the crown lawyers of England had developed; and, after the separation from that country, the American commonwealths continued to apply the doctrine, substituting, however, of course, the respective States for the English Crown. With the formation of the present Union, and the transfer to it by the several States of their respective claims to public lands, the United States was substituted as the owner of all the lands to which private titles had not been obtained. This grant to the Federal Government carried with it whatever interest or title the several States had had in the Indian lands.

The first discussion in the Supreme Court of the United States of the title or interest still retained by the Indians in the lands occupied by them, was in the case of Fletcher v. Peck.[1] This case involved the question whether the State of Georgia had been seized in fee of certain lands which it had sold, but later resumed possession of. Marshall in his opinion, without attempting an argument, said: "The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State."

In Johnson v. M'Intosh [2] the question of titles to Indian lands was thoroughly examined and a conclusion reached which was substantially the same as that boldly stated without argument by Marshall in Fletcher

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[1] 6 Cr. 87.

[2] 8 Wh. 543.

v. Peck. In substance it was held that although the fee to Indian lands is in the United States, and, therefore, that the Indians are not able to grant titles to the same which will be recognized in the courts of the United States, nevertheless these Indians have certain possessory rights from which they may be dispossessed by the United States only with their consent, and upon compensation made.

The doctrines thus laid down in 1823 by Marshall in Johnson v. M'Intosh have never been changed, and the practice of the United State Government uniformly throughout its history has been in accordance with it. That is to say, where Indians have been dispossessed of their lands their consent, in form at least, has been obtained, and compensation made either in the form of money or other lands. Where tribal relations have been maintained these possessory rights have been held to be vested in the tribes respectively, and not severally in the individual Indians. From time to time, however, as we shall see, the United States Government has provided for the dividing up of these tribal lands and their apportionment in severalty among the individual Indians.

§ 172. The Legal Status of Indians.

From the earliest times the Indians, though treated as subject to the sovereignty first of the foreign colonizing powers, then of the colonies or States, and, finally, of the United States, have been considered not as citizens or subjects, that is, as members of the various bodies-politic within whose midst they have lived, but, from the constitutional point of view, as aliens, and their tribes as foreign nations to be dealt with as such, namely, by treaties and agreements rather than by statutes. As alien nations, their members have not, in default of express provision to the contrary, been held subject to the general laws of the States in which they have resided or to the statutes of the General Government. The relations of Indians to one another have been held to be a matter for the several tribal authorities to regulate, and when these tribal authorities have been impotent, the Indians have lived practically without law.

At the same time, however, that these Indians have thus enjoyed tribal autonomy, and their relations to the States and to the Federal Government regulated by treaties and agreements rather than by statute, and their tribes spoken of as foreign nations, there has never been any question that, in reality, the sovereignty over them after the Revolution and prior to 1789 was in the individual States, and since that time in the United States. From the point of view of general international relations the Indians have always been subjects of the American States or the United States, and, consequently, foreign States have never been conceded to have a right to deal directly with them. Furthermore, from the point of view of American constitutional law, such attributes of independence and sovereignty as they have enjoyed have been derived from the States, or, since 1789, from the Federal Government. Hence these rights have been at all times subject to withdrawal without the Indians' consent. This was conspicuously shown by the act of Congress of 1871. This law for the enactment of which the consent of the Indians was neither sought nor obtained declared: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." [3]

Since this act of 1871 the legal supremacy of the United States has been further shown by a number of legislative acts, some of them extending the authority of Federal laws and the jurisdiction of the Federal courts over acts previously subject exclusively to the authority of the tribes; others providing for the apportionment in severalty of the tribal lands and the naturalization of Indians without their request or consent.

The only direct references to the Indians in the Constitution are the provisions that "Indians not taxed" shall not be counted in determining the number of representatives in Congress to which a State is to be entitled,[4] and that Congress shall have power "to regulate commerce . . . with the Indian tribes." [5] It has, however, been held by the Supreme Court that the General Government has an authority over the Indians not springing from specific grants of power, aside from the general treaty-making power, but from the practical necessity of protecting the Indians and the non-existence of a power to do so in the States.[6]

§ 173. Federal Jurisdiction Exclusive. Cherokee Nation v. Georgia.

The exclusiveness of this Federal jurisdiction, and, consequently, the lack of constitutional power of the States in this field, first came up for serious discussion in the Supreme Court of the United States in the case of the Cherokee Nation v. Georgia,[7] decided in 1831. This case came before the court on a motion on behalf of the Cherokee Nation of Indians for a subpœna and for an injunction to restrain the authorities of the State of Georgia from executing the laws of the State within the Cherokee territory as designated by a treaty between the United States and the Cherokee Nation. The case, however, was not decided on its merits, the majority of the court, including Chief Justice Marshall, holding that the Cherokee Nation was not a foreign State within the meaning of the clause of the Constitution which extends the Federal judicial power over controversies "between a State or the citizens thereof, and foreign States, citizens, or subjects," and gives to the Supreme Court original jurisdiction in cases in which a State is a party. It was held, therefore, that the court was without power to entertain the suit.

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[3] Rev. Stat., § 2079.

[4] Art. I, § 3.

[5] Art. I, § 8, Cl. 3.

[6] United States v. Kagama (118 U. S. 375). See also matter of Paterson v. Seneca Nation (245 N. Y. 433).

[7] 5 Pet. 1, 17.

Upon this point, Marshall, in his opinion, said: "Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may be well doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

In the great case of Worcester v. Georgia,[8] decided in 1832, the question of the political status of the Indians again came before the Supreme Court for discussion and a doctrine laid down which has remained unquestioned to the present day. This case, like Cherokee Nation v. Georgia, grew out of the attempt of Georgia to exercise jurisdiction over Indian territories situated within the State's limits. This action of the State was declared unconstitutional and void, the exclusive authority of the Federal Government being emphatically asserted, "the Cherokee Nation" the court said, "is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . . The whole intercourse between this nation is by our Constitution and laws, vested in the Government of the United States."

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[8] 6 Pet. 515. See also The Kansas Indians (5 Wall. 737); The New York Indians (5 Wall. 761).

§ 174. Naturalization of Indians by Statute.

In 1884, in the case of Elk v. Wilkins,[9] the question arose as to whether an Indian, born a member of one of the Indian tribes within the United States, became a citizen of the United States, under the Fourteenth Amendment, by reason of his birth within the United States, and his afterwards voluntarily separating himself from his tribe and taking up residence among white citizens. The court held negatively, the statement being made that "the alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without action or assent of the United States."

Since this decision a number of acts of Congress have been passed which have had the effect of destroying, to a very considerable extent, the autonomous tribal governments of the Indians and of subjecting them to the immediate legislative control of Congress instead of to the treaty-making power.[10]

At various times during past years, Congress has declared, as to particular Indian tribes, that their lands should be divided and held in severalty by their respective members, and that, thereupon, such Indians should become citizens of the United States, and pass immediately from the exclusive jurisdiction of the Federal Government to that of the States in which they reside. By the General Land in Severalty Law, known as the "Dawes Act," approved February 8, 1887, the President was given the power to apply this process to practically every Indian reservation in the country. The peculiarity of these acts is, it will be observed, that they make citizens of Indians against their will. The action is taken at the discretion of the President and the result is citizenship.[11]

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[9] 112 U. S. 94.

[10] As to the constitutionality of this legislation, and its effect upon the jurisdiction of the States, see United States v. Kagama (118 U. S. 375).

[11] For cases sustaining this legislation, and declaring generally the extent of the legislative authority of Congress over the Indians, see Cherokee Nation v. Southern Kansas Ry. Co. (135 U. S. 641); Stephens v. Cherokee Nation (174 U. S. 445); Cherokee Nation v. Hitchcock (187 U. S. 294); Lone Wolf v. Hitchcock (187 U. S. 553); United States v. Rickert (188 U. S. 432); *In re* Heff (197 U. S. 488); Hallowell v. United States (221 U. S. 317).

CHAPTER XXI

THE ADMISSION OF NEW STATES

§ 175. The Admission of New States.

The process of admitting new States to the American Union is a comparatively simple one and but few constitutional questions have arisen in connection with it. The constitutional clause governing the subject reads as follows: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress."[1] It will thus be seen that nothing is said as to the conditions that must be met by a given Territory before it may claim, or Congress be obligated to grant, admission to the Union as a State. The whole matter is left absolutely to the discretion of Congress. There can be no question that at the time of the adoption of the Constitution the idea was generally held that all non-State territory held or to be held by the United States was to be regarded as material from which new States were to be created as soon as population and material development should warrant. But no attempt was made to force the hand of Congress under circumstances that could not be foreseen by defining in the Constitution itself the conditions under which Statehood should be accorded. But one limitation is laid down, and that impliedly, and this relates rather to the status of new States after admission, than to the process of admission itself. This is that the new commonwealths, when received into constitutional fellowship with the older members of the Union, shall stand upon an exactly equal footing with them.[2]

As has been seen, the Constitution does not attempt to fix the *modus operandi* in which new members are to be admitted into the Union. It does not even say whether they are to be formed from territory already under its sovereignty, and in one instance, that of Texas, a new State was received by the direct process of incorporating, by a joint resolution of Congress, a foreign independent State. In all other cases, however, new States have been formed from areas already belonging to the United States and organized as Territories.

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[1] Art. IV, § 3.

[2] *Cf.* Coyle v. Oklahoma (221 U. S. 559); *In re* C. A. Taylor Logging and Lumber Co. (28 F. [2d] 526).

There has been some little constitutional speculation as to whether the decisive, creative act in the bringing into existence of a new State is the Resolution of Congress approving the Constitution that has been drawn up and declaring the former Territory one of the States of the Union; or whether the vivifying force is derived from the constituent act of the people of the Territory in framing and adopting their State Constitution. The latter is the view most acceptable to the States' Rights School. It would seem to be sufficiently plain, however, that the former is the correct doctrine; for there can be no question that it lies within the power of Congress arbitrarily to refuse its approval to a Constitution that has been framed by the people of a Territory strictly in accordance with the requirements of the Enabling Act. The final and, therefore, decisive step, has thus to be taken by the Federal Government.

This doctrine has, indeed, received implied judicial sanction at the hands of the United States Supreme Court in the case of Scott v. Jones.[3]

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[3] 5 How. 343. *Cf.* Jameson, *Constitutional Convention*, § 207.

CHAPTER XXII

THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY

§ 176. Sources of Power.

In the chapters that have gone before the effort has been made to set forth the constitutional relations existing between the Union and its commonwealth members. From the very beginning, however, the American constitutional system has included other political units than the States. These units are Territories, Dependencies, and a Federal District or Seat of National Government. To a consideration of the constitutional questions incident to the annexation and government by the National Government of the territories and peoples of which these political elements are composed, we shall now turn. This will involve a discussion of the following points: (1) The constitutional power of the United States to acquire territories; (2) the modes or purposes for which they may be acquired; and (3) their constitutional status. First then as to the power to acquire.

The constitutional power of the United States to annex foreign territory has been, at various times, and by various writers, derived from the following sources:

1. The power to admit new States into the Union.
2. The power to declare and carry on war.
3. The power to make treaties.
4. The power, as a sovereign body-politic, to acquire territory by discovery and occupation or by any other methods recognized as proper by international usage.

With regard to deriving the power to annex from the power to admit new States, it is sufficient to observe that not only is resort to this source unnecessary, but, when appealed to, it would not seem to yield to the National Government as ample powers as are furnished it when the treaty and war powers are relied upon: and, furthermore, that considerable support is given to the position that, when the power is exercised, the consent of the other States should be obtained.

There can be no question that it was the general intention at the time the Constitution was adopted that all the territory then under the sovereignty of the United States, and not included within the limits of any one of the then several States, should ultimately be divided up and admitted as States into the Union. Also it is to be admitted that, beyond all reasonable doubt, those who framed and adopted the Federal Constitution did not anticipate, and therefore cannot be said deliberately to have provided for, the time when the United States should extend its sovereignty over territories not intended ultimately for Statehood. Nor can it be said that a different view was held upon this point by practically anyone until comparatively recent times. But, admitting this, the conclusion that the annexation of territory not intended for ultimate Statehood is an unconstitutional act does not follow. One must go further and show that had the particular case been suggested to those framers and adopters of the Constitution, they would have so modified its language as to have excluded it.[1] In the second place, even were this principle of constitutional construction not sufficiently broad to uphold the Federal power in question, there would be applicable two principles, each of which would prevent the Supreme Court from passing upon this point. The first of these principles is the one elsewhere mentioned that the question of *de facto* and *de jure* sovereignty is one regarding which the courts hold themselves bound by the determination of the executive and legislative branches of the government; the second is that the motive of an act, except for the purpose of solving an ambiguity in its application, is not a proper subject for judicial examination, and that, therefore, in the case of annexation of territory, it would not be proper for the court to require whether or not ultimate Statehood is intended to be granted the lands and peoples obtained. Indeed, as we have seen, as regards the contiguous continental territories of the United States, it has been uniformly held that the grant to them of Statehood lies wholly within the discretion of Congress, and that no legal means exist for compelling action should that body arbitrarily refuse for an indefinite length of time to grant this privilege to a deserving territory.

The question whether or not territory not contiguous to the other territory of the United States may be annexed is one very similar to the one just discussed and may be answered in much the same manner.[2]

§ 177. The Right to Annex Based on the Treaty and War Powers.

The Supreme Court has held that whether or not the right to admit States into the Union carries with it the power to acquire new territory, this power is derivable from the authority of the General Government to declare and carry on war and to enter into treaties. This has been repeatedly declared, both in earlier cases and in the more recent so-called Insular Cases.

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[1] In Dartmouth College v. Woodward (4 Wh. 518), Marshall says: "The case being within the words of the rule, must be within its operation likewise, unless there be something within its literal construction so obviously absurd or mischievous, or repugnant to the general spirit of that instrument as to justify those who expound the Constitution in making it an exception."

[2] See Senate Rept. 681; 55th Cong., 2d Sess., pp. 47, 48.

In American Insurance Co. v. Canter,[3] Marshall said, without, apparently, deeming an argument necessary: "The Constitution confers absolutely upon the government of the Union the power of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or treaty." In Fleming v. Page,[4] Taney said: "The United States may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered or to reimburse the government for the expenses of the war." In Stewart v. Kahn,[5] the court said: "The war power and the treaty-making power each carries with it authority to acquire new territory." And in United States v. Huckabee [6] it was declared: "Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States."

It is to be observed that in none of these cases is there any argument to show just why, and in what manner, the acquiring of the foreign territory is a necessary or proper means by which war may be carried on, or treaties entered into. In fact it will be seen that the acquiring of foreign territory has been treated as a result incidental to, rather than as a means for, the carrying on of war and the conducting of foreign relations.

This leads to the consideration of the doctrine which, constitutionally speaking, appeals to the author as the soundest mode of sustaining the power of the United States to acquire territory, as well as the one which, in application, affords the largest cope for its exercise. According to this principle the right to acquire territory is to be searched for, not as implied in the power to admit new States into the Union, or as dependent specifically upon the war and treaty powers, but as derived from the fact that in all relations governed by the principles of international law the General Government may properly be construed to have, in the absence of express prohibitions, all the powers possessed generally by the sovereign States of the world. This doctrine thus is that the control of foreign relations being exclusively vested in the United States, that government has, in the exercise of this jurisdiction, the same power to annex foreign territory that is possessed by other sovereign States. The argument in support of this doctrine has already been given.

In one instance at least the United States has acquired territory under an authority which could not be, and was not alleged to be, derived from the treaty-making power or from any other specific express power, but was upheld by the Supreme Court as based upon the general sovereignty of the nation with respect to all matters that fall within the field governed by international law. Reference is here had to the annexation in 1856 of the Guano Islands by a statute of Congress which declared that whenever any citizen of the United States should discover a deposit of guano on any island, rock or key not within the lawful jurisdiction of any other government, and should take possession thereof, such island, rock or key might, at the discretion of the President, be considered as appertaining to the United States.[7]

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[3] 1 Pet. 511.

[4] 9 How. 603.

[5] 11 Wall. 493.

[6] 16 Wall. 414.

§ 178. The Modes in Which Territory May Be Acquired by the United States.

Having discussed the constitutional power of the United States to acquire territory whether by treaty, conquest or discovery and occupation, we now approach the question as to the modes by which this Federal authority may be exercised.

A history of the territorial expansion of the United States shows that territories have been annexed in three different ways: (1) by statute; (2) by treaty; (3) by joint resolution of the two houses of Congress; (4) by executive act.

The process of expanding American sovereignty by simple statute and executive action authorized thereby, was illustrated, as we have just seen, in the case of the Guano Islands. The annexation of territory by treaty has been the method most usually employed. The Louisiana Territory, Florida, Alaska, the Mexican cessions, the Samoan Islands, Porto Rico, and the Philippines were obtained in this manner. The constitutionality of this mode of acquisition has already been discussed.

§ 179. Annexation by Joint Resolution.

In two instances, that of Texas, in 1845, and Hawaii in 1898, the sovereignty of the United States has been extended over new territory by means of a joint resolution of the two Houses of Congress. In the case of Texas an attempt had been made to annex the territory by treaty, but this effort, requiring a two-thirds favorable vote in the Senate, had failed. Thereupon the same end was secured by a joint resolution which needed but a simple majority vote in each of the two branches of the national legislature, with, of course, the approval of the President.

The peculiarity of the annexation of this State was not simply that it came under American sovereignty by joint resolution but that it became at once one of the States of the Union, and thus never had the transitional Territorial status. This fact, indeed, gave additional constitutional support to the action of Congress in the matter, for to that body is given by the Constitution the power to admit new States into the Union, and, therefore, its admission of Texas to fellowship with other American commonwealths might easily be construed as a legitimate exercise of that power.

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[7] See Jones v. United States (137 U. S. 202).

The acquisition of the Hawaiian Islands was another instance of the extension of the United States sovereignty by a simple joint resolution of the two branches of Congress. In this case, however, the Islands were not, as was Texas, admitted as a State or States of the Union, but were simply annexed as an insular dependency.

The constitutionality of this mode of annexation has never been disputed in the courts, because, as has been earlier pointed out, questions as to the territorial extent of the sovereignty of the United States are political in character and, therefore, the decisions of the legislative and executive branches of government as to them are not judicially reviewable.

§ 180. Annexation by Executive Act.

The sovereignty of the United States over the eastern Samoan Islands appears to rest upon no other basis than the acceptance by the President of the cession made by the chiefs of those islands. Not until 1929 did Congress give its approval to this executive action.[8]

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[8] 45 Stat. at L. 1253. Joint Resolution of Feb. 20, 1929.

CHAPTER XXIII

THE CONSTITUTIONAL SOURCES OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES

§ 181. Power to Govern Territories not Questioned.

There has never been any question as to the power of the United States to govern the Territories possessed or acquired by it and not included within the limits of any of the individual States. The only question has been as to the source and extent of this power. The Federal authority to govern has been derived from three sources: (1) The express power given to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" (2) the implied power to govern derived from the right to acquire territory; and (3) the power implied from the fact that the States admittedly not having the power, and the power having to exist somewhere, it must rest in the Federal Government.

All three of these sources of authority have been, at different times, recognized by the Supreme Court.[1]

§ 182. Power to Govern Absolute.

Since the time when the necessity for the exercise of the power arose, there has been almost no question as to the absolute power of Congress to determine the form of political and administrative control to be erected over the Territories, and to fix the extent to which their inhabitants shall be admitted to a participation in their own government. Both by legislative practice and by judicial sanction, the principle has, from the first, been asserted that upon this matter the judgment of Congress is absolute. This, however, has not been construed to carry with it the absolute control of the Federal legislature over the civil rights—the private rights of person and property of the inhabitants of the Territories. The extent of the power of Congress with respect to these will be discussed in the next chapter.

The plenary character of the legislative power of Congress with respect to the government of Territories is perhaps best stated in National

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[1] Sere v. Pitot (6 Cr. 332); American Insurance Co. v. Canter (1 Pet. 511); Cross v. Harrison (16 How. 164); Scott v. Sandford (19 How. 393); United States v. Kagama (118 U. S. 375); Mormon Church v. United States (136 U. S. 1); DeLima v. Bidwell (182 U. S. 1).

Bank v. County of Yankton.[2] Chief Justice Waite, speaking for the court, said: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

§ 183. Territorial Governments Are Congressional Governments.

The governments established in the Territories by Congress act as agencies of Congress, in the same sense that an administrative board acts as the agent of the lawmaking body that creates it. As such congressional agencies, the Territorial governments are, therefore, not considered as parts of the General Government established or directly provided for by the Constitution. Thus, speaking with reference to the courts established in the Territories, Marshall in an early case declared: "These . . . are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." [3]

And again in Benner v. Porter [4] the court said, with reference to Territorial governments: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers on the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine."

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[2] 101 U. S. 129. See also, for similar comprehensive statements, Murphy v. Ramsey (114 U. S. 15); and Mormon Church v. United States (136 U. S. 1).

[3] American Insurance Co. v. Canter (1 Pet. 511, 546). *Cf. Ex parte* Bakelite Corp., (279 U. S. 438, 449, 450).

[4] 9 How. 235, 242. See *In re* Cooper (143 U. S. 472); and United States v. Coe (155 U. S. 76), to the effect that admiralty jurisdiction may be exercised by these courts, and also that the Supreme Court may entertain appeals from them.

§ 184. Classes of Territorial Governments.

Generally speaking there have been but two kinds of Territorial Governments: unorganized and organized. The former have exhibited no elements of local self-government: they have been administered by officials nominated by the President and confirmed by the Senate, and have had for their laws such laws as have been given to them by Congress. Organized Territorial Governments, on the other hand, have chief executive and judicial officials who are nominated by the President and confirmed by the Senate and who hold office for terms of four years. Their legislatures consist of two Houses, each elected by those inhabitants of the Territories to whom have been given the suffrage by Federal law. The law-making power of these legislatures is, as a rule, extended by Congress "to all rightful subjects of legislation not inconsistent with the Constitution or laws of the United States." The laws passed in pursuance of this legislative authority are, therefore, subject to the scrutiny of the courts as to their validity and they may be amended or annulled at any time by an act of Congress.

The Territories of Alaska, Porto Rico, the Hawaiian Islands, and the Philippines may be spoken of as "organized," though their governments differ in details. Alaska received its present organized government in 1912. Porto Rico received its first civil government in 1900, but this Foraker Act was replaced by the present Organic Law in 1917, known as the Jones Act.

§ 185. Islands under Military Administration.

The United States possesses a number of islands of no considerable size, which have been and are more or less autocratically governed by military officers of the United States acting simply under executive orders of the President and without the aid of locally elected assemblies. Among such areas are the Samoan, Wake, Midway, and Guam Islands.

CHAPTER XXIV

THE DISTRICT OF COLUMBIA AND PLACES PURCHASED BY THE UNITED STATES

§ 186. The Government of the District of Columbia.

The constitutional status of the District used as the seat of the Federal Government is almost the same as that of the Territories. Clause 17 of section 8 of Article I of the Constitution empowers Congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States."

The District of Columbia though not a "State" in the sense in which that word is used in the constitutional clause which gives to the Federal courts jurisdiction in suits between citizens of different States, is declared in DeGeofroy v. Riggs,[1] to be a State within the meaning of a treaty granting certain rights to aliens within the "States of the Union." That the District is a part of the United States internationally viewed was declared in Loughborough v. Blake, and this *dictum* has never been questioned.

But with reference to the form of government to be given the District, the authority of Congress is as absolute as we have seen it to be with regard to the Territories. "The Congress of the United States being empowered by the Constitution 'to exercise exclusive jurisdiction in all cases whatever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, National or local. It may exercise within the District all legislative powers that the legislature of a State may exercise within a State." [2]

The Constitution provides that Congress shall "exercise exclusive legislation in all cases whatsoever" over such district as shall, by cession of particular States, become the seat of Government. To the author it would seem that the intent of those who framed this provision was that by it Congress should be granted authority exclusive of the State or States by which the territory constituting the District might be ceded. Congress has, however, since the beginning, acted upon the assumption that by this provision it is intended that while ordinary municipal powers may be delegated to the local governing body in the District, it may not delegate to such body the general legislative powers possessed by a State of the Union; that, in other words, the legislative authority over the District being vested by the Constitution "exclusively" in Congress, it may not by delegation be exercised by any other body. Thus, dividing the governing powers in the United States into National, State and local, it has been held necessary that, as regards the District, the first two must be exercised by Congress itself.[3]

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[1] 133 U. S. 258; 10 Sup. Ct. Rep. 295. See also Loughborough v. Blake (5 Wh. 317), and Hepburn v. Ellzey (2 Cr. 445), in the last of which cases it was held that the District is not a State of the Union within the meaning of that provision of the judicial article of the Constitution which gives to the Federal courts jurisdiction in suits between citizens of different States.

[2] Capital Traction Co. v. Hof (174 U. S. 1). *Cf.* Heald v. Dist. of Columbia, (259 U. S. 114, 124).

When legislating for the District, and the same is true of the Territories, Congress acts not only as a local legislature in the sense that a State legislature acts as the local legislature for that State, but also as a National Legislature. Whence it follows that the laws thus enacted, though of course only applicable to the local areas, the District or the Territories, especially referred to, are yet National acts in that, so far as it is necessary for their enforcement, they have a validity throughout the Union. This doctrine is clearly laid down by Marshall in Cohens v. Virginia,[4] and has not since been questioned.

§ 187. Places Purchased.

The same clause of the Constitution which grants to Congress exclusive jurisdiction over the district to be selected for the seat of the National Government, authorizes Congress "to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The Federal ownership of such tracts within the States is to be sharply distinguished from political jurisdiction over them. This latter, as the Constitution provides, may be obtained only when the districts have been acquired with the consent of the States in which they are situated.

The language of the clause would seem to indicate that the framers of the Constitution intended that the General Government could or should acquire land within the States only by purchase, and with the consent of the States. In practice, however, this consent has not always been obtained, or been deemed necessary. But, in such cases, the political jurisdiction of the State is not ousted, except as regards the governmental use of such lands by the Federal Government.[5]

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[3] It cannot be said that the Supreme Court has passed squarely upon this point, but by various *dicta* the doctrine stated in the text has been declared. See, e.g., Stoutenburgh v. Hennick (129 U. S. 141); Cohens v. Virginia (6 Wh. 264); also Roach v. van Riswick (McArthur & Mackay, 171).

[4] 6 Wh. 264.

Also, the General Government is able to acquire lands within the States by the exercise of the right of eminent domain, a right which it may employ when "necessary and proper" to the exercise of any of its expressly given powers. When thus obtained, the lands, like those acquired by direct purchase and without the consent of the States, remain subject to the general political jurisdiction of the States in which they are located. As property of the United States they are not, however, subject to taxation by the States.[6]

In Ohio River Contract Co. v. Gordon[7] it was held that State courts are not deprived of jurisdiction to entertain suits for personal damages by reason of the fact that the injuries occur upon lands within the exclusive jurisdiction of the United States.

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[5] Ft. Leavenworth R. R. Co. v. Lowe (114 U. S. 525).

[6] Kohl v. United States (91 U. S. 367); St. Louis v. W. U. Telegraph Co. (148 U. S. 92); Van Brocklin v. Tennessee (117 U. S. 151).

[7] 244 U. S. 68.

CHAPTER XXV

MILITARY AND PRESIDENTIAL GOVERNMENT OF ACQUIRED TERRITORY

§ 188. Conquest or Military Occupation Does Not Operate to Annex Territory.

Mere conquest, that is, the occupation by military force of foreign territory, is not sufficient to annex such territory to the State whose forces are in possession of it. However, for the time being, as a belligerent right, and from necessity, the entire control of this area, its government, and the lives and property of its inhabitants are in the hands of the victorious power. The inhabitants are no longer protected by the State whose forces have been ousted, and for the time being owe no allegiance to it, but owe an allegiance to the State which is in possession.[1]

The government established and maintained by one State in military possession of territory of another, is, of course, a *de facto* one, but *de facto* in a somewhat different sense from an insurrectionary government established as a result of a rebellion or civil war. But in either case the authority of the *de facto* government is, to an extent at least, recognized by the *de jure* government. This is adverted to by the Supreme Court in Thorington v. Smith [2] in passing upon the status of the Confederate Government established during the Civil War.

In New Orleans v. New York Mail Steamship Co.[3] was considered the status of territory of the Southern Confederacy which had been conquered by the Federal forces. The court held that the Federal forces in possession might exercise the same absolute authority as in the case of territory conquered from a foreign State.

§ 189. Presidential Government.

The government maintained by the President over a conquered territory, being belligerent, is, according to the general doctrines of international law regarding military occupation, absolute in character: "It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war." [4]

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[1] United States v. Rice (4 Wh. 246); Fleming v. Page (9 How. 603); Neely v. Henkel (180 U. S. 109); De Lima v. Bidwell (182 U. S. 1); Dooley v. United States (182 U. S. 222).

[2] 8 Wall. 1.

[3] 20 Wall. 387.

It has been seen from the preceding cases that the power of the President, as Commander-in-Chief of the army and navy, is practically absolute over conquered territory. And also, as was held in Cross *v.* Harrison, that this power persists after the formal annexation of the territory in question to the United States and until Congress legislates for its government. It would appear, however, that during this latter period, the President's power is not as absolute as in the period prior to annexation. Absolute power, according to American constitutional doctrines, is only justified by military necessity, and, therefore, with the cessation of hostilities and the annexation of the territory by which it is brought within the general province of the American doctrine, there spring up certain limitations upon the President's governing power.[5] The extent of these limitations will be discussed in a later chapter dealing with martial and military law, and with the doctrines laid down by the Supreme Court in the "Insular Cases" determining the political status and the civil rights of the inhabitants of the islands acquired in 1898 from Spain.

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[4] New Orleans v. New York Mail S. S. Co. (20 Wall. 387).

[5] Dooley v. United States (182 U. S. 222).

CHAPTER XXVI

ANNEXATION OF TERRITORY BY TREATY

§ 190. Status of Territory Annexed by Treaty.

That, under the treaty-making power provided in the Constitution, a foreign country may be brought under the sovereignty of the United States, and thus, from the point of view of international law, become a part of it, is, as we have seen, beyond question. In De Lima v. Bidwell,[1] one of the "Insular Cases," decided in 1901, the point was urged, however, that, before such annexed territory can become "domestic" territory and as such be brought, *ipso facto*, under the operation of the Federal laws generally, an act of Congress to that effect is necessary.

Prior to the De Lima case, this question had been several times raised, especially with reference to the immediate applicability of the revenue laws of the United States to annexed territories, but had never been thoroughly discussed, nor had administrative practice and the laws been harmonious with judicial pronouncements, nor these judicial pronouncements harmonious with one another.

In Fleming v. Page,[2] decided in 1850, it was held, as has been seen, that conquest and military occupation of a foreign district do not, *ipso facto*, make that district a part of the United States, and, therefore, that duties may properly be levied upon goods imported therefrom into the United States under an act of Congress imposing duties upon imports from foreign countries. Taney, however, in his opinion went further than the facts of the case necessitated, and adverted to the circumstance that the administrative department of the government had, as a rule, continued to treat territory acquired by treaty as foreign until Congress by legislation had extended over it its revenue laws.

In Cross v. Harrison,[3] however, decided in 1853, it was held by a unanimous court, including Chief Justice Taney himself, that by the ratification of the treaty of 1848 between Mexico and the United States, California became a part of the United States, and the tariff laws of the United States *ipso facto* applicable to it.

In De Lima v. Bidwell,[4] with reference to the Island of Porto Rico, the court held itself governed by the doctrine declared in Cross v. Harrison.

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[1] 182 U. S. 1.

[2] 9 How. 603.

[3] 16 How. 164.

[4] 182 U. S. 1.

Applying the doctrine of De Lima v. Bidwell, the Supreme Court, in another of the Insular Cases, Dooley v. United States,[5] held that though, after the treaty of peace providing for the annexation of Porto Rico, the military government might continue until Congress should provide the Island with a civil government (according to the doctrine of Cross v. Harrison), the Island was no longer "foreign territory," and, therefore, under the then existing revenue laws of the United States, providing for the levying of customs duties on goods imported from foreign countries, that duties might not be levied on importations into the United States from Porto Rico, nor from the United States into that Island.

In the case of The Diamond Rings,[6] decided in 1901, the court applied the doctrine of De Lima v. Bidwell in fixing the status of the Philippine Islands subsequent to the treaty of cession. The fact that resistance on the part of the natives to the control of the United States continued to be made, was held to be without weight.

§ 191. Presidential Powers.

The absolute power of Congress to determine the political or governmental rights in annexed territories constitutionally attaches from the moment that they become subject to the sovereignty of the United States. Until Congress exercises this right, however, and provides them with governments and laws, they remain under the control of the Federal executive. This duty devolves upon the President as a result of his general obligation to see that the authority and peace of the United States are everywhere maintained throughout its territorial limits. Thus, after the treaty of peace with Spain in 1899, Porto Rico remained under the control of the President until, by the act of April 12, 1900, known as the "Foraker Act," Congress provided a government for that island. So also it was by an exercise of the same authority that the President, after the same treaty of cession, appointed a "Commission" for the government of the Philippine Islands.

On March 2, 1901, Congress enacted that "All military, civil and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government and for the maintaining and protecting of the inhabitants of said islands in the free enjoyment of their liberty, property and religion." This act changed the basis of the Philippine government from a presidential to a congressional one, but did not change its form, the President being given by Congress practically the same powers that before that time he had exercised by virtue of his position as Chief Executive.

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[5] 182 U. S. 222. See also Jecker v. Montgomery (13 How. 498); Raymond v. Thomas (91 U. S. 712).

[6] 183 U. S. 176.

By the act of July 1, 1902, entitled "an act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," Congress not only approved and ratified the previous acts of the Philippine Commission, but went on to define the general line of action which that body should take, especially with regard to the introduction of local self-government as fast as circumstances should warrant.

The constitutional source of the power of the United States to establish and maintain governments not annexed to itself but in the possession of its military forces is derived both from the power given Congress to declare and wage war, and from the fact of its exclusive authority in all that relates to international affairs, which fact, as we have seen, properly implies the right, in the absence of express prohibitions, to exercise all the powers possessed by sovereign States generally.

From the same source was derived the power of the United States to administer Cuba, and to establish consular courts in oriental countries.

CHAPTER XXVII

THE DISTINCTION BETWEEN INCORPORATED AND UNINCORPORATED TERRITORIES

§ 192. Limitations upon Congress.

The Constitution of the United States contains a number of express limitations upon the Federal legislative power. In addition to those contained in the first ten Amendments relative to freedom of religion, speech, and press, the quartering of troops, the right of the people to assemble, to petition, to keep and bear arms, to be secure against unreasonable searches and seizures, to presentment or indictment by jury, to speedy trials, to juries in civil suits, to immunity from excessive bails and fines and cruel and unusual punishments, etc., it is elsewhere provided in the Constitution that all duties, imposts, and excises shall be uniform throughout the United States, that the writ of habeas corpus shall not be suspended, except under certain specified circumstances, that no bill of attainder or *ex post facto* law shall be passed, no capitation or other direct tax laid except in proportion to population, no duty laid upon goods exported from a State, no commercial preferences given to the ports of one State over those of another, no money drawn from the treasury but in consequence of an appropriation made by law, no title of nobility granted, etc. The Thirteenth Amendment also declares that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

When legislating for the States or for their inhabitants these limitations have of course to be observed. The question whether the same is true when Congress is legislating for the Territories and their populations has now to be examined.

§ 193. Distinction between Incorporated and Unincorporated Territories.

In the preceding chapters we have learned the source whence is derived the power of Congress and of the President to govern annexed territories. We have learned that by mere military occupation a territory, though for the time being subject to the *de facto* control of the President as Commander-in-Chief of the army and navy, is not annexed to the United States, that is, it does not become permanently subject *de jure* as well as *de facto* to its sovereignty. Only by treaty, or by statute, or by joint resolution of Congress, may this annexation be effected.

When thus annexed, however, a district may, according to the recent "Insular Cases," find itself, or by subsequent legislative action be placed, in any one of the following categories:

1. A State of the Union.
2. A "Territory" incorporated into the Union. This Territory may be either "unorganized" or "organized."
3. A Territory appurtenant to, that is, subject to the sovereignty of, the United States, but not "incorporated," constitutionally speaking, into the Union of States and Territories for the benefit and protection of whose inhabitants the Constitution was adopted.

Such "appurtenant," dependent or unincorporated territory is, of course, from the international point of view, a part of the United States, but is not, as we shall see, a part thereof in the stricter constitutional sense in which the term is used in the Constitution with reference to certain limitations which that instrument lays upon the legislative powers of Congress.

With respect to the form of government that may be established and maintained by Congress over the Territories, there is no distinction between an incorporated and an unincorporated Territory. In either case the congressional authority is absolute as to whether local self-governing powers will be granted to their inhabitants. With respect, however, to the civil or private rights of the inhabitants of the Territories, the distinction is very important. For if it be that a Territory is merely appurtenant to, but not "incorporated" into, the United States, Congress in its legislation regarding it is bound by but few of the limitations which apply in the case of incorporated Territories, whether organized or unorganized.

This distinction between incorporated and unincorporated territory is one that was not clearly made until the decision of the Insular Cases. Prior to that time, there had been a number of decisions by the Supreme Court which indicated that such a distinction did not, and could not, exist according to the constitutional law of the United States. There were, however, on the other hand, not a few legislative and administrative precedents which supported such a doctrine; and, by rigorously confining the contrary decisions of the Supreme Court to the facts of the cases in which they were rendered, it was found possible to escape from their control, and to hold that the term "United States" as used in at least some of the clauses of the Constitution, does not, and was not intended to, include all districts subject to the sovereignty of the United States; and that, as to such areas not within the limits of the "United States," in this strict constitutional sense, Congress, in the exercise of its legislative powers, is not subject to the limitations which rest upon it when dealing with Territories which are included in the United States.[1]

§ 194. The Insular Cases.

As a result of the Spanish-American War the United States came into possession of territories over which, because of their location, their economic and industrial status, and especially the character of their populations, it was deemed expedient to give to the Executive or to Congress the freest possible discretion with reference not only to the manner in which they should be governed, but to the civil rights that should be granted their inhabitants. The question whether, in dealing with these new insular possessions, Congress should be held subject to all those constitutional limitations which apply when dealing with civil rights in the States or in the then existing Territories, thus became a most important one.

The form in which this question arose for judicial determination was as to the constitutionality of that clause of the Foraker Act establishing civil "congressional" government in Porto Rico, which provided a scale of customs duties to be paid upon goods brought into the ports of the United States from the Island. This necessarily involved an answer to the question whether the provision of the Constitution that "all duties, imposts and exercises shall be uniform throughout the United States" applied *ex proprio vigore* to Porto Rico, or whether, having never been formally "incorporated" by Congress into the United States either expressly or by implication, the Island was not a part of the "United States" within the meaning of the term as used in the constitutional clause just quoted.

In Downes v. Bidwell [2] five of the nine justices of the Supreme Court concurred in holding that, though by the treaty of cession the Island of Porto Rico came under the sovereignty of the United States, and when viewed from the standpoint of all other nations became a part of the United States, it did not, when looked at from the point of view of its own public law, become a part of the "United States" as that term is used in the Constitution.

Four of these five justices were able to reach this conclusion: First, by making a sharp distinction between "incorporated" and "unincorporated" Territories; Second, by holding that the treaty-making power, though able to annex Territories to the United States, that is, bring them under its sovereignty internationally speaking, is not competent to incorporate such areas in the United States, but that for this purpose the express or implied consent of Congress is necessary; and Third, that Congress in legislating for unincorporated Territories is not subject to many of the limitations which apply when it is legislating for the States and incorporated Territories.

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[1] Chief among the cases, prior to 1901, dealing with the status of Territories, and the civil rights of their inhabitants are the following: Loughborough v. Blake (5 Wh. 317); American Insurance Co. v. Canter (1 Pet. 511); Webster v. Reid (11 How. 437); Scott v. Sandford (19 How. 393); Reynolds v. United States (98 U. S. 145); National Bank v. Yankton (101 U. S. 129); Murphy v. Ramsey (114 U. S. 15); Callan v. Wilson (127 U. S. 540); Mormon Church v. United States (136 U. S. 1); American Publishing Co. v. Fisher (166 U. S. 464); Springville v. Thomas (166 U. S. 707); Thompson v. Utah (170 U. S. 343).

[2] 182 U. S. 244.

It will be observed that, as far as the general limitations upon the legislative powers of Congress are concerned, these four justices placed the States and the incorporated Territories in the same class. Only the unincorporated Territories were by them excluded from the protection of such limitations as, for example, that Federal tax laws shall be uniform throughout the United States. The fifth Justice, Brown, who concurred with these four, did not, as we shall see, make any distinction between incorporated and unincorporated Territories, but excluded them all from the term "United States," and from the protection of all but the most fundamental of the constitutional limitations upon the powers of Congress. The constitutional rights which these limitations create, he asserted, do not belong to the citizens of any Territories until by an act of Congress they have been extended to them. Thus, while the four justices divided the domains of the United States into the three classes of States, Incorporated Territories and Unincorporated Territories; Justice Brown recognized only two categories, States and Territories.

It will have been seen that the net result of the decision in Downes v. Bidwell, whether we follow the reasoning of Justice Brown, or of the four justices who concurred in the judgment rendered, is that, as to Territories which have not been incorporated into the United States (or, according to Justice Brown, over which the Constitution has not been extended by an act of Congress) Congress is not limited by some of the restrictions enumerated or implied in the Constitution. Just which of these limitations do not, in such cases, control Congress, it remains for the Supreme Court to determine in each particular case as the point arises.

In Downes *v.* Bidwell it was held that the restriction that "all duties, excises and imposts shall be uniform throughout the United States" does not apply.

§ 195. Hawaii.

In Hawaii v. Mankichi [3] it was held that the provisions of the Fifth and Sixth Amendments with reference to indictment by a grand jury and trial by petit jury, also did not apply. The facts and questions of law involved in this case were these. The Joint Resolution of Congress of July 7, 1898, had provided for the annexation of the Hawaiian Islands "as a part of the territory of the United States, and subject to the sovereign dominion thereof." The Resolution, indeed, expressly declared that "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." After the annexation to the United States, Congress not having determined otherwise, the defendant in error, Mankichi, was tried for and convicted of manslaughter according to the usual course of procedure in force in the Republic of Hawaii prior to July 7, 1898, which course of procedure did not require the indictment to be found by a grand jury, and which permitted a less number than the entire twelve of the petit jury to convict. An application for a writ of habeas corpus having been made by Mankichi upon the ground that, according to the Constitution of the United States, no one might be tried for manslaughter except upon an indictment or presentment found by a grand jury, and the case having been appealed to the Supreme Court of the United States, that tribunal was called upon to determine: first, whether it was the intention and the necessary effect of the annexing Joint Resolution to make these constitutional provisions immediately applicable to the Islands; and secondly, if it did not, whether it lay within the power of Congress or of the authorities of Hawaii to deny to the accused the rights in question. The court answered the first question in the negative, and the second in the affirmative.

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[3] 190 U. S. 197.

§ 196. Alaska.

In Rassmussen v. United States,[4] decided in 1905, it was held that Alaska had been incorporated into the United States, and, therefore, that the inhabitants were entitled to jury trial. The court did not, however, attempt to lay down any definite rule for determining when incorporation had taken place, but contented itself with quoting certain sentences from the opinion in Dorr v. United States,[5] and holding that the treaty by which Alaska had been acquired, and the legislation of Congress subsequent thereto, did not bring that Territory within the category of unincorporated Territories according to the test implied in the sentences quoted. This Rassmussen case is, however, significant, in that it exhibits the definite adherence of the court to the doctrine of the distinction between incorporated and unincorporated Territories.

In this Rassmussen case the attempt had been made to maintain the doctrine that, even if incorporated, Alaska was not entitled to the right in question for the reason that it had not been made an "organized" Territory. This contention, however, the court held clearly unsound. Incorporation and not organization, it was declared, is the test as to the general applicability of the Constitution. Justice Brown concurred, but, as might have been expected from his position in Downes *v.* Bidwell, held that the general applicability of the Constitution depended not upon the fact of incorporation, but upon whether Congress had by some expression of its will clearly shown that it intended that the particular provision of the Constitution should apply.

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[4] 197 U. S. 516.

[5] 195 U. S. 138.

That the Thirteenth Amendment forbidding slavery and involuntary servitude except as punishment for crime applies in the unincorporated as well as the incorporated Territories, is clear, its language expressly extending its force not only to the United States but to "any place subject to their jurisdiction." Certain forms of slavery do, however, undoubtedly exist in some of the Philippine Islands, but there is of course no legality in this, and as soon as possible, the custom or practice will be suppressed, if, indeed, it has not already been suppressed.[6]

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[6] For other recent adjudications with reference to the Territories, see Binns v. United States (194 U. S. 486); Kepner v. United States (195 U. S. 100); Goetze v. United States (182 U. S. 221); Dooley v. United States (183 U. S. 151); Warner, Barnes & Co. v. United States (197 U. S. 419); Balzac v. Porto Rico (258 U. S. 298).

CHAPTER XXVIII

CITIZENSHIP IN THE TERRITORIES

§ 197. Effect of Cession.

Whether or not inhabitants of territories ceded by one nation to another necessarily have, according to the principles of international law, the option of becoming citizens of the annexing State, or retaining their old citizenship, is a point upon which international law writers do not seem to be fully agreed. That, in the absence of treaty stipulation to the contrary, the citizenship of the inhabitants of ceded territory is to be that of the annexing state, is, however, generally admitted by American international law writers, and has been more than once declared by the United States Supreme Court.[1]

§ 198. Treaty Provisions.

In all the treaties entered into by the United States whereby territory was acquired, prior to that with Spain in 1898, it was provided either that the inhabitants of the ceded territories remaining therein should be admitted as soon as possible to the enjoyment of all the rights, advantages and immunities of citizens of the United States, or that they should be "incorporated in the Union of the United States," or both. It cannot, however, be said with certainty, as has been maintained by some, that it was due to these provisions that the inhabitants of the ceded territories were collectively naturalized, for this point has never been squarely passed upon by the Supreme Court. The undoubted purpose and the probable legal effect of these provisions was only to create an obligation on the part of the United States not to discriminate civilly against these people, and, when the conditions should warrant, to confer upon them full political privileges. The determination when this time had arrived was left to the discretion of Congress. Provisions similar to those of which we have been speaking are almost always inserted by all nations in treaties of cession at the instance of the ceding power, as a matter of equity, it being but just that in handing over to the control of another power citizens of its own, a State should, as far as possible, obtain a guarantee that they should not be civilly or politically oppressed.

By these treaties of cession entered into by the United States, the inhabitants of the ceded territories did become, however, United States citizens under the general rule quoted above, because those treaties contained no stipulations to the contrary.

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[1] American Insurance Co. v. Canter (1 Pet. 511); Boyd v. Nebraska (143 U. S. 135).

In the treaty of peace with Spain which provided for the cession to the United States of Porto Rico, Guam and the Philippines, we find for the first time appearing a provision expressly asserting, that the cession of the Islands is not to operate as a naturalization of their native inhabitants, but that the determination of their civil rights, and political status, is to be left to the subsequent judgment of Congress. Spanish subjects, natives of the Iberian Peninsula, but resident in the Islands, are, however, given the right to elect whether or not they will retain their old citizenship or become American subjects.

In the Insular Cases it was held that the Islands obtained from Spain have not been incorporated in the "United States." Their inhabitants have not been naturalized by statute, and the treaty with Spain expressly refuses them citizenship. The whole question of their civil status thus depends upon whether or not they are citizens according to the provision of the Fourteenth Amendment, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." That is to say, it will depend upon whether the term "United States," as here employed, will be construed to include or exclude "unincorporated" Territories.

As has been said, this question has not been passed upon precisely, by the Supreme Court, but the positions taken in the Insular Cases would indicate that inhabitants of these insular possessions, though subject to the sovereignty of, and owing allegiance to, the United States, are not citizens within the strict constitutional sense. Certainly by the executive and legislative departments of the National Government the position has been taken that they are not.

§ 199. Statutory Provisions.

The citizens of Hawaii have been made citizens of the United States by statute enacted April 30, 1900.

By the act of Congress of July 1, 1902, providing for the administration of civil government in the Philippine Islands all inhabitants thereof, continuing to reside there who were Spanish subjects at the time of the cession of the Islands to the United States, and their children born subsequent thereto, and who have not elected to preserve their Spanish allegiance, are described as "citizens of the Philippine Islands." So similarly, in the act of April 12, 1900, establishing a civil government in Porto Rico, the phrase "citizens of Porto Rico" is employed, and the designation "citizens of the United States" avoided. And in the Naturalization Act of June 29, 1906, provision is made (§ 30) for the naturalization, under certain circumstances, of "persons not citizens who owe permanent allegiance to the United States."

In Gonzales v. Williams [2] it was held that a native of Porto Rico who was an inhabitant of that Island at the time of its cession to the United States is not an "alien" within the meaning of the act of Congress of March 3, 1891, providing for the detention and deportation of alien immigrants likely to become public charges. No position is taken by the court, however, with reference to the question of citizenship.

The Supreme Court has held that the Territories of the United States such as Porto Rico and Hawaii are not suable without their consent.[3]

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[2] 192 U. S. 1. *Cf.* Balzac v. Porto Rico (258 U. S. 298). By the Jones Act of 1917, citizenship has been granted to certain residents of Porto Rico.

[3] Kawananakoa v. Polyblank (205 U. S. 349).

CHAPTER XXIX

FOREIGN RELATIONS: THE TREATY POWER

§ 200. Federal Powers Exclusive.

The exclusiveness of the Federal jurisdiction in all that concerns foreign affairs is deducible both from the national character of the General Government, and from the express provisions of the Constitution.

The States are expressly forbidden to "enter into any treaty, alliance or confederation," "to grant letters of marque and reprisal," or, unless Congress consents, to "lay any duty of tonnage, keep troops or ships of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will admit of no delay."

Upon the other hand, the General Government is expressly empowered "to provide for the common defense and general welfare of the United States;" "to regulate commerce with foreign nations;" "to make treaties;" "to establish an uniform rule of naturalization;" "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;" "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water;" "to raise and support armies;" "to provide and maintain a navy;" "to makes rules for the government and regulation of the land and naval forces;" "to provide for the calling forth the militia to . . . repel invasions;" "to appoint ambassadors and other public ministers and consuls;" to adjudicate causes arising under treaties, and all cases affecting ambassadors, other public ministers and consuls, cases of admiralty and maritime jurisdiction, and cases between a State, or the citizens thereof, and foreign States, citizens and subjects. Finally, it is declared that: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution or the laws of any State to the contrary notwithstanding."

From these express grants of power to the General Government, and prohibitions of treaty powers to the States, the intention of the framers of the Constitution to invest the Federal Government with the exclusive control of foreign affairs is readily deducible.

§ 201. Federal Powers Comprehensive.

The control of international relations vested in the General Government is not only exclusive, but all-comprehensive. That is to say, the authority of the United States in its dealing with foreign powers includes not only those powers which the Constitution specifically grants it, but all those powers which sovereign States in general possess with regard to matters of international concern. This general authority in the United States is fairly deducible from the fact that in its dealings with other States the United States appears as the sole representative of the American people; that upon it rests, therefore, the obligation to perform all the duties which international law imposes upon a sovereign State; and that, therefore, having those duties to perform it is to be presumed to have commensurate powers.[1]

The reasoning of the court in maintenance of the principle that in all that concerns foreign relations the United States has the same plenitude of constitutional power as that possessed by other sovereign States is sound. An appeal, however, to the fact of "national sovereignty" as a source of Federal power is not a valid one outside of the international field. It cannot properly be resorted to when recognition of an international obligation on the part of the United States is not involved, and when, therefore, the matter is purely one relating to the reserved powers of the States or to the private rights of the individuals. To permit the doctrine to apply within these fields would at once render the Federal Government one of unlimited powers.[2]

Though comprehensive in scope, the treaty-making power of the Federal Government must, in its exercise, as concerns the substance of the agreements entered into, have regard for the various constitutional limitations, necessarily implied as well as those expressed, which restrain generally the exercise of Federal powers. Indeed, the Supreme Court has several times said, in so many words, that the authority given to the United States to enter into treaties does not extend "so far as to authorize what the Constitution forbids." [3]

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[1] The comprehensive character of the powers of the National Government with reference to foreign affairs has been especially asserted in a line of cases dealing with the exclusion from the United States of undesirable aliens and especially of the Chinese. See Chinese Exclusion Cases (130 U. S. 581); Ekiu v. United States (142 U. S. 651); Fong Yue Ting v. United States (149 U. S. 698). See, also, United States v. Jones (109 U. S. 513); as to the constitutional authority of Congress to provide for the occupation and annexation of the Guano Islands.

[2] For an excellent general discussion of the constitutional extent of the treaty power of the United States, see Missouri v. Holland (252 U. S. 416).

[3] See the recent declaration to this effect in Asakura v. City of Seattle (265 U. S. 332).

§ 202. The Manner of Exercise of the Treaty-Making Power.

The Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

With respect to the manner in which treaty-making is, according to the Constitution, to be conducted, the first question that arises is as to the extent to which the Senate may properly participate not only in the ratification, but in the preliminary negotiation of international agreements.

In the same clause, indeed in the same sentence, of the Constitution in which provision is made for entering into treaties, it is provided that the President "shall nominate and by and with the advice of the Senate shall appoint ambassadors, other public ministers and consuls," etc. Here the phraseology shows that the act of nominating the public officials mentioned, is clearly distinguished from their appointment. They are to be nominated by the President, but are to be appointed by the Senate and President. The negotiating of treaties is not, however, by the phraseology of the treaty clause thus sharply distinguished from their ratification as regards the Federal organs by which this negotiation and ratification are to be performed. The language is that the President "shall have power, by and with the advice and consent of the Senate, to make treaties," not that "he shall negotiate, and, with the consent of the Senate, ratify treaties."

As further indicative of an intended participation of the Senate in the negotiation of treaties, is the fact that in the Convention, until almost the last moment, it was agreed that the treaty-making power should be vested exclusively in the Senate, a body the membership of which it was thought at that time would remain comparatively small.

§ 203. Negotiation of Treaties.

Actual practice exhibits frequent instances in which the Senate has participated in the negotiation of treaties, particularly during the first years under the Constitution when the relations between the President and the Senate were especially close. After the first years under the Constitution, however, the practice on the part of the President of consulting the Senate with regard to the treaties to be negotiated, became an infrequent one, but yet not one wholly obsolete.[4]

In a number of cases the Senate has by resolution suggested to the President that certain negotiations be initiated. Thus in 1835 the Senate requested the President to open negotiations with the Central American governments with a view to securing treaties granting protection to such individuals as might undertake the construction of an interoceanic canal. In 1888 President Cleveland was requested by the Senate to open negotiations with China for the regulation of immigration of subjects of that country into the United States. In 1880, by a concurrent resolution, the Senate and House of Representatives requested the Executive to seek the coöperation of other powers in providing for the amicable settlement by arbitration of disputes which could not be settled through the ordinary diplomatic channels. By an act of Congress, the President was, in 1902, advised and authorized to enter into certain treaty arrangements with reference to the construction of an interoceanic canal.

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[4] See article in *Scribner's Magazine*, Jan., 1902, by Sen. Lodge, entitled "The Treaty-Making Power."

All of the instances cited above, are, however, by way of general exception to the rule that the negotiation of treaties is in the hands of the President. The Senate's function, so far at least as its formal action is concerned, is limited to the disapproval or ratification, with or without amendments, of the treaties after they have been agreed upon by the President and the chancellaries of the foreign countries concerned.

Though, as has just been said, the formal participation of the Senate as a body in the negotiation of treaties is not often now solicited, that body is, as a matter of fact, according to modern usage, frequently, indeed, it might be said, generally, kept well informed as to the progress of international negotiations by means of personal interviews between the Executive and prominent Senators, especially, of course, those serving upon the Committee on Foreign Affairs. In 1898 three of the five commissioners appointed to negotiate the Treaty of Peace with Spain were Senators and members of this Committee.

The recognition by the United States of a status of belligerency, and the recognition of the sovereignty and independence of a foreign government are political acts, not subject to judicial review, and are performed by the President. At times the claim has been made that this power of recognition is one to be exercised at the dictation of Congress, but precedents are against the claim. It is to be presumed, however, that, when the recognition of a status of belligerency or of the independence of a revolutionary government is likely to constitute a *casus belli* with some other foreign power, the President will be guided in large measure by the wishes of the legislative branch. Upon the other hand, it is the proper province of the Executive to refuse to be guided by a resolution on the part of the legislature if, in his judgment, to do so would be unwise. The legislature may express its wishes or opinions, but may not command.

§ 204. The Power of the Senate to Amend Treaties.

There would seem to be no question that, having the power either to approve or disapprove an international agreement negotiated by the

President, the Senate has also the power, when disapproving a proposed treaty, to state upon what conditions it will approve; in other words, to amend any treaty submitted to it. Upon the other hand, it is equally within the province of the Executive to consider the amendment of a treaty by the Senate as a rejection of it. When, therefore, a treaty has been amended in the Senate, it is within the President's power to abandon the whole treaty project, or to reopen negotiations with the foreign country or countries concerned with a view to obtaining their consent to the changes desired by the Senate, or, finally to begin *de novo* and attempt to negotiate an entirely new treaty, which he may hope will secure senatorial approval. In case he decides to follow the second of these courses, namely, to secure the approval of the foreign country or countries to the amendments to the treaty project made in the Senate, and is successful in this, it would seem that the treaty need not be again submitted to that body for its approval, but may be at once promulgated.[5]

The approval of the Senate being essential to all treaties entered into by the United States, it has been held that all protocols, and explanations given by the Executive as to the meaning of treaty provisions, which have not been passed upon and approved by the Senate, are not to be considered as internationally binding upon the United States, or enforced in its courts. For this reason it is not constitutional for the President to insert in a treaty secret provisions which have not been approved by the Senate. Most of the written Constitutions of foreign powers have specific prohibitions with reference to secret provisions.

After a treaty has been signed by the commissioners appointed to negotiate it, or agreed upon by the Departments of State of the countries concerned, there is no constitutional obligation upon the President to submit it to the Senate, and, even after submission to that body, he may withdraw it, as for instance was done by President Cleveland with reference to a reciprocity treaty with Spain which had been sent to the Senate in 1884 by President Arthur. In a like manner the Hawaiian Annexation treaty of 1893, and the Nicaraguan Canal Convention of 1884 were withdrawn for "re-examination" after having been sent to the Senate.

Even after being favorably acted upon by the Senate, it would appear that, under certain circumstances, the President may refuse to ratify a treaty. Thus, in 1888, when China proposed certain changes in an agreement with this country which had already been approved by the Senate, the President abandoned the entire project.

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[5] See Crandall, *Treaties: Their Making and Enforcement*, pp. 68 *et seq.* In Haver v. Yaker (9 Wall. 32), the court recognizes the right of the Senate to amend projects of treaties.

§ 205. International Agreements Not Requiring Submission to the Senate.

Not all agreements entered into by the United States with foreign powers are held to be treaties in the sense in which that term is used in the treaty clause of the Constitution. Such agreements as are held not to be treaties in this sense, it has been the practice of the President, acting in pursuance of his general powers as Chief Executive or as authorized by congressional statute, to enter into and promulgate without submission to the Senate. Furthermore, in not a few instances the Senate has itself expressly conferred upon the President the power to contract with foreign powers with reference to specified matters.[6]

International correspondence is exclusively in the hands of the President, or his agent, the Secretary of State. Hence it is improper for any international documents to be addressed to, or sent directly to the Senate, or for any attempt to be made, in any way, by an agent of a foreign power to influence directly the action of the Senate upon a treaty that is pending before it or is later to be sent to it for its action thereupon. Upon the other hand, it is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President. Thus, when in 1877 Congress passed two joint resolutions congratulating the Argentine Republic and the Republic of Pretoria upon their having established a republican form of government, and directing, in the one case, the Secretary of State to acknowledge the receipt of a dispatch from Argentine, and in the other to communicate with Pretoria, the President vetoed both resolutions.

By virtue of the power exclusively vested in him to conduct diplomatic negotiations between this and a foreign country, the President has, since early years, entered into numerous agreements with foreign chancellaries for the settlement of claims made by private American citizens against foreign governments. In a considerable number of cases these claims have been settled by means of arbitrations agreed upon between the foreign offices concurred.

In no case has the President attempted, without consulting the Senate, to adjust finally claims brought by foreigners against the United States. In no case, also, has the President, by executive action, attempted the settlement of claims set up by the United States in its own behalf.

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[6] See pamphlet, reprinted from the *Yale Review*, by J. F. Barnett, entitled "International Agreements Without the Advice and Consent of the Senate"; article by J. B. Moore in the *Political Science Quarterly*, Sept., 1905, entitled "Treaties and Executive Agreements"; and article by C. C. Hyde in *Greenbag*, April, 1905, entitled "Agreements of the United States other than Treaties."

The constitutional authority of the President, without consulting the Senate, to enter into protocols of agreement as the basis for treaties to be negotiated, is beyond question, and has repeatedly been exercised without demur from the Senate.

As the term indicates, a *modus vivendi* is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form. Continued and unquestioned practice supports the doctrine that these *modi vivendi* may be entered into by the President without consulting the Senate.[7]

In the exercise of his powers as Commander-in-Chief of the army and navy the President of the United States, from both necessity and convenience, is often called upon to enter into arrangements which are of an international character. These conventions do not require the approval of the Senate. A conspicuous example of international agreements thus entered into is the protocol signed at Pekin in 1901. All protocols of agreement entered into for the purpose of furnishing a basis for treaties of peace, as for example, the Protocol of 1898 with Spain, come under this head. So do all conventions providing in time of war for an armistice, or the exchange of prisoners, etc.

The President's military powers exist in times of peace as well as during war. And thus, in 1817, the President, without obtaining the advice and consent of the Senate, was able, by an exchange of diplomatic notes, to arrange with England regarding the number of vessels of war to be kept by the two powers upon the Great Lakes. So also, upon his own discretion, the President is able to send American vessels of war to whatever ports he sees fit, whether for the purpose of friendly visits, of furnishing protection to American citizens or their property, or of making a "demonstration" in order to obtain desired action on the part of the State thus overawed.[8]

§ 206. Extradition.

The greatly preponderant weight of opinion is that, in the absence of authority expressly given him by treaty or statute, the President has not the constitutional right to extradite to a foreign country a fugitive to this country. The single instance in which the President has extradited without such authority expressly conferred upon him is the surrender to Spain by Lincoln in 1864 of one Arguelles.

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[7] For instances, see Butler, *The Treaty-Making Power*, I, p. 369, note.

[8] By general treaties as well as by statutes the President is often given authority to enter into specific international agreements which do not need to be submitted to the Senate for its approval before they become effective. The constitutionality of this delegation of authority is considered in Field v. Clark (143 U. S. 649).

Whether or not Congress has the power by statute to authorize the President to extradite fugitives to countries with which the United States has no subsisting treaty upon the subject is not certain, as there has been no instance of the exercise of such power. Reasoning upon general principles, however, there would seem to be no constitutional objection to such legislation.

CHAPTER XXX

CONGRESSIONAL LEGISLATION FOR THE ENFORCEMENT OF TREATIES

§ 207. Auxiliary Legislation Often Necessary.

Though all treaties, as declared by the Constitution, are parts of the supreme law of the land, they are not always, in whole or in part, self-executing, but require for their enforcement ancillary legislative action. Especially is this legislative assistance required when an expenditure of money is called for. The treaty-making power is able to obligate the United States internationally to the payment of sums of money, but is not able itself to appropriate from the United States treasury the amounts called for, or to compel the legislature to provide for their payment. The same is true as to other legislation which may be required in order to put a treaty into full force and effect. The moral and political obligation upon Congress to supply this legislation or to make the necessary appropriations is, however, exceedingly strong. As parts of the supreme law of the land, treaties rest upon a plane of equality with acts of Congress, but upon no higher plane. Resulting from this, it has been held in a number of well-considered cases that an act of Congress operates to repeal or annul prior treaty provisions inconsistent with it.[1]

§ 208. Effect of Treaties on Existing Statutes.

We have now to examine whether, without congressional direction or permission, it is competent for the treaty-making power to regulate a matter which it is within the legislative power of Congress to control or, by international agreements, to alter arrangements which Congress has by statute already established.

That the treaty-making power extends to many subjects within the ordinary legislative powers of Congress there can be no doubt. The Supreme Court has, in a number of instances, declared that treaties and acts of Congress stand, as law, upon exactly equal planes, and, therefore, that the later treaty operates to supersede the earlier law, exactly, as we have seen, the later law has the effect of abrogating a prior inconsistent treaty.[2]

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[1] Edye v. Robertson (Head Money Cases) (112 U. S. 580); Chae Chan Ping v. United States (130 U. S. 581). See also cases cited by Butler, *The Treaty-Making Power*, I, p. 86.

[2] Foster v. Neilson (2 Pet. 253); Cherokee Tobacco Case (11 Wall. 616). See also United States v. Lee Yen Tai (185 U. S. 213), and cases there cited.

In fact, however, there have been few instances in which a treaty inconsistent with a prior act of Congress has been given full force as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject. Furthermore, with specific reference to commercial arrangements with foreign powers, Congress has explicitly denied that a treaty can operate to modify the arrangements which it, by statute, has provided; and, in actual practice, Congress in every instance has succeeded in maintaining this point.

There would seem to be, however, in practice, one exception to the rule that the later treaty abrogates the prior inconsistent statute, and this is in reference to acts for raising revenue. The Constitution expressly declares that "all bills for raising revenue shall originate in the House of Representatives." Strictly interpreted this provision might be held to apply only to "bills," that is, to propositions for a statute, but in practice the spirit of the clause has been followed rather than its exact letter.[3]

After an account of the practice of the government and of discussions of the subject in Congress, Mr. Crandall, writing in 1904, says: "From this historical review it appears that, whatever may be the *ipso facto* effect of the treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operations is expressly made dependent upon the action of Congress; and that in the recent Cuban treaty such a clause was inserted on the initiative of the Senate."[4]

It is to be observed, before leaving this subject, that in no case has the treaty-making power, whatever its actual concessions, ever admitted in full terms its inability to fix as laws matters which are within the legislative powers of Congress. Thus, in 1902, Senator Cullom emphatically asserted that only with reference to the appropriation of money is legislative assistance needed in order that treaties may receive acceptance as laws in our courts.[5]

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[3] See Moore's *Digest of International Law*, V, p. 223; and report of Senate Committee on Foreign Affairs, *Compilation of Reports of the Committee on Foreign Relations*, VIII, p. 36.

[4] *Treaties: Their Making and Enforcement*, p. 145.

[5] Butler, *The Treaty-Making Power*, I, p. 457.

It is to be remarked, however, that in Bartram v. Robertson,[6] and Whitney v. Robertson,[7] though the point is not expressly discussed, it would seem that the court impliedly held that a treaty might modify revenue laws, for in these cases the effect of treaties upon existing tariff laws was considered without a suggestion that the inquiry was an unnecessary one because of the inability of the treaty-making power to modify such statutes.

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[6] 122 U. S. 116.

[7] 124 U. S. 190.

CHAPTER XXXI

THE CONSTITUTIONAL EXTENT OF THE TREATY-MAKING POWER

§ 209. Treaty-Making Power Not Expressly Limited.

The treaty-making power is granted in the Constitution without any express limitations as to the subjects to which it may relate. And all treaties, without qualification, are declared to be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If, then, there are any limitations upon its extent, they must be found inherent to the nature of treaties themselves, or implied in other clauses of the Constitution, or in the very nature of the polity which that instrument is designed to create and maintain.

No treaty has ever been held unconstitutional in any court, Federal or State, in the United States. That there are, however, limits, despite the fact that in no case has there arisen the necessity for applying them in a court of law, would appear beyond question. From the early years of the present Government to the decision of the Insular Cases in 1901, the Supreme Court has, upon frequent occasions, stated, not only in general terms, but with reference to specific matters, that there are limits to the subjects that may, by treaty, be made the supreme law of the land.[1] And in Downes v. Bidwell [2] four of the majority justices declared in their opinion that the treaty-making power is incompetent to incorporate annexed territory into the United States. And the minority justices asserted that "a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal jurisdiction, would be simply void."

These *dicta* of the Supreme Court are really *obiter* in that in no case was a treaty provision held void. However, the statement being so often and so positively asserted it may be taken for granted that there are constitutional limits to the treaty-making power, and that when these limits are overstepped, the courts will interpose their veto.

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[1] New Orleans v. United States (10 Pet. 662); Pollard's Lessee v. Hagan (3 How. 212); Cherokee Tobacco Case (11 Wall. 616); DeGeofroy v. Riggs (133 U. S. 258), and cases there cited.

[2] 182 U. S. 244, 312. For additional declarations by the Supreme Court that treaties are necessarily subordinate to the provisions of the Constitution, see Ware v. Hylton (3 Dall. 199); United States v. The Peggy (1 Cr. 103); Lattimer v. Poteet (14 Pet. 4); Doe v. Braden (16 How. 635), Thomas v. Gay (169 U. S. 264). In United States v. Wong Kim Ark (169 U. S. 649), the minority point out that the effect of the decision of the majority is to limit the treaty-making power with reference to the prevention of children of resident aliens, born within the United States, from becoming citizens of the United States.

§ 210. The Treaty-Making Power and the Reserved Rights of the States.

The supremacy of a Federal treaty over a conflicting State law, with reference to matters not reserved to the States, has not been questioned since the time it was established that a Federal statute, enacted within either the concurrent or exclusive constitutional competency of Congress, operates to nullify all inconsistent State legislation. In this respect, as the Constitution expressly declares, treaties and acts of Congress are upon precisely the same footing.[3]

It may, then, be considered as established that a treaty entered into by the Federal Government with respect to a matter within the Federal jurisdiction is supreme over a conflicting State law. This leads to the question whether, by an exercise of the treaty-making power, the Federal Government may regulate matters within the States which it may not control by an act of Congress, and if, in this respect, the treaty-making power is broader than the legislative, in what respects, and to what extents, it is broader.

Upon this point the declarations of the Supreme Court are not completely satisfactory. In various of its opinions this tribunal has explicitly asserted that the rights reserved by the Constitution from the control of the other departments of the Federal Government may not be infringed by its treaty-making power.[4]

Opposing, however, the *dicta* of these cases there is a line of cases in which treaties have been held constitutional with reference to matters which are admittedly not within the power of Congress to control. And, also, there have been numerous cases in which State laws with reference to matters within the ordinary legislative competency of the States, have been held void because of conflict with subsisting Federal treaties.[5]

Thus, in the case of DeGeofroy v. Riggs,[6] it is declared: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiations and of regulation by mutual stipulations between the two countries. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.[7] But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

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[3] Ware v. Hylton (3 Dall. 199); Fairfax v. Hunter (7 Cr. 603); Chirac v. Chirac (2 Wh. 259); Hauenstein v. Lynham (100 U. S. 483); Techt v. Hughes (229 N. Y. 222); Missouri v. Holland (252 U. S. 416).

[4] Prevost v. Greenaux (19 How. 1); License Cases (dissenting opinion of Daniel) (5 How. 504); Passenger Cases (dissenting opinion of Taney) (7 How. 283).

[5] Ware v. Hylton (3 Dall. 199); Hopkirk v. Bell (3 Cr. 454); Fairfax v. Hunter (7 Cr. 603); Chirac v. Chirac (2 Wh. 259); Lattimer v. Poteet (14 Pet. 4); Hauenstein v. Lynham (100 U. S. 483). See also dictum in Ward v. Race Horse (163 U. S. 504). See also note 8.

[6] 133 U. S. 258.

In a number of instances State laws with reference to matters ordinarily within State cognizance have been held void when in conflict with existing Federal treaties. Examples of this are laws denying the right of the alien to be employed by contractors upon public works, or to be employed by private corporations.[8]

How, then, are we to harmonize these declarations that the reserved rights of the States may not be infringed by the treaty power with the fact that, in specific instances, the invasion of these rights has been upheld?

Strictly speaking, the two positions, thus absolutely stated, cannot be harmonized. There is no principle which can be stated that will bring the *dicta* quoted into consonance with the decisions referred to. Either the *dicta* denying to the treaty-making power the right to infringe State rights are wrong, and must be abandoned, or the decisions upholding such infringement were improper, and will not be followed in the future.

The author is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that properly relates to international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, when the necessity from the international standpoint arises the treaty-making power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

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[7] Citing Fort Leavenworth R. R. Co. v. Lowe (114 U. S. 525).

[8] Baker v. Portland (5 Sawyer, 566); *In re* Tiburcio Parrott (6 Sawyer, 349); *In re* Ah Chong (6 Sawyer, 451). *Cf.* Proceedings of the Am. Soc. of International Law, 1907, address by Prof. C. N. Gregory.

§ 211. Implied Limitations upon the Treaty-Making Power.

Assuming, then, that the reasoning that has gone before is correct, it may be asked: Are we led to the conclusion that, in extent, the treaty-making power is without constitutional limits?

Briefly stated, the answer is that these limitations are to be found in the very nature of treaties. That is, that the treaty-making power may not be used to secure a regulation or control of a matter not properly and fairly a matter of international concern. It cannot be employed with reference to a matter not legitimately a subject for international agreement, any more than can the States under a claim of an exercise of their police powers regulate a matter not fairly comprehended within the field of police regulation. Thus, while it might be appropriate for the United States, by treaty with England, to provide that English citizens living in the United States should have certain rights of property, or schooling privileges, etc., within the States, State law to the contrary notwithstanding, it would not be appropriate, and, therefore, would not be constitutional, for the United States by such a treaty to provide that all aliens, whether British subjects or not, should enjoy these rights within the States within which they might live. So likewise, it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution; or that a power now exercised by one of the departments of the General Government should be exercised by another department. For these are matters of domestic national law with which foreign powers have no concern. In short, the treaty-making power is to be exercised with constitutional *bona fides.*

The principle which has been stated, that, to be constitutionally valid, a treaty must have reference to a subject properly a matter of international agreement, excludes from the Federal treaty-making power the authority to disregard those prohibitions of the Constitution, express and implied, which are directed not to Congress but to the National Government as a whole.

One final point with reference to the treaty-making power deserves notice. This is that where, for its enforcement, a treaty requires ancillary legislation, Congress would seem to have the constitutional power to enact the needed laws, even though these may relate to matters not within the general sphere of its legislative authority. For it is to be presumed that the General Government has the power to render effective a treaty which it has the constitutional power to enter into. A somewhat analogous case is the legislative power recognized to belong to Congress with reference to matters of admiralty and marine, because of the grant to the Federal Judiciary of jurisdiction over admiralty and maritime causes.[9]

It has earlier been pointed out that an act of Congress inconsistent with the terms of a subsisting treaty operates, to the extent of the inconsistency, to deprive such treaty of its force as law within the United States. This is, however, only a matter of municipal law. As an international compact, the treaty continues to bind the United States, and, if, by such congressional action, the United States Government is rendered unable to give to it full force and effect, the other parties to it have a legitimate grievance which they can redress by the negotiation of a new agreement, or, failing peaceful modes of settlement, by more drastic means, should the grievance be deemed a sufficiently serious one.

Congress has, however, upon occasion, done more than invalidate by statute treaty provisions. It has, at times, directed or recommended that the President denounce specified treaty engagements, or that he take steps to secure their replacement by provisions which, in the opinion of Congress, will be more advantageous, or less disadvantageous, to the United States. Congress has, indeed, gone further than this and asserted its constitutional right itself to denounce treaties, or, at any rate to make its approval a requisite for their denouncement by the Executive.

The propriety of Congress thus advising or directing the President to give to foreign governments notice of the termination of treaties between them and the United States has not gone without question by the President.

The merits of the issue thus raised between the President and Congress are made evident when there is borne in mind the distinction between a treaty as an international compact and, under the American Constitution, as a municipal law.

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[9] That the treaty-making power is incompetent to "incorporate" foreign territory into the United States (Insular Cases) or to provide that children born within the United States of alien parents shall not be citizens of the United States (United States v. Wong Kim Ark, 169 U. S. 649) we have already seen. That the treaty-making power may alienate territory would seem to be certain. See *Willoughby The Constitutional Law of the United States*. See also the same work for a discussion of constitutional questions connected with the violation of treaties, whether by affirmative acts upon the part of the United States, by failure of Congress to enact the necessary ancillary legislation, by subsequent repealing statute, or by the declaration of the courts that they are unconstitutional and void of legal force.

In so far as a treaty is regarded as a part of the supreme law of the land it may, as has been seen, be abrogated by the legislative power, that is, by Congress and the President. This may be done by statute or joint resolution, and such abrogation may be expressed in so many words or implied by the enactment of laws inconsistent with subsisting treaty provisions. This, it would seem, is all the constitutional power that the Congress has with reference to treaties, although there is nothing constitutionally improper (and often there may be considerations of political expediency which warrant it), in the President asking the advice of Congress as to what steps it will be wise for him to take with reference to the entering into or the abrogation of certain treaties. Furthermore, when the Executive or the treaty-making power has denounced a treaty there may be conditions which render it politically expedient that he should obtain from Congress, as has been seen he has occasionally done, the approval of that body. But such approval, when obtained or denied, can have no constitutional effect upon the treaties concerned, unless stated in words which the courts could construe as amounting to declarations. And, even then, such legislative declarations would of course not become a part of the supreme law of the land until approved by the President or reaffirmed by a two-thirds vote if disapproved by him.

Treaties entered into by the United States may be viewed in two lights: (1) as constituting parts of the supreme law of the land, and (2) as compacts between the United States and foreign Powers. Viewed in this second light the existence, construction or alleged violation of a treaty is a matter outside judicial cognizance, and within the exclusive concern of the political departments.[10]

Because, under the United States Constitution, treaties are the supreme law of the land as well as international compacts, they prescribe, if self-executing, rules in accordance with which private rights may be determined.[11]

Whether or not a treaty is to be deemed still in force is for the political departments of the government to determine.[12]

Though the Senate participates in the ratification of treaties, the President has at times exercised the authority, without asking for senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States. In important cases, however, it is usual for him to seek senatorial approval before taking action. But whether or not this approval be sought, the courts hold themselves bound by the denunciation, the existence or non-existence of a treaty being a political question the decision upon which by the political departments of the government is binding upon the judicial department.

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[10] Taylor v. Morton (2 Curtis, 454); Head Money Cases (112 U. S. 580); Whitney v. Robertson (124 U. S. 190).

[11] Edge v. Robertson (112 U. S. 580).

[12] Terlinden v. Ames (184 U. S. 270). As to the effect of war upon the continuation of treaties, see Karnuth v. United States (279 U. S. 231).

§ 212. Construction of Treaties.

So far as treaties are regarded as international compacts, the national rights and obligations accruing thereunder are determined by the political departments of the government.[13] So far as they are of the nature of legislative acts, and rights accruing thereunder come before the courts for determination and enforcement, the courts necessarily have to construe them.[14] When possible, however, the courts will give to the treaties the construction which they may have previously received by the political departments of the government. This is, however, not an absolutely obligatory rule.[15] It is one of expediency, and of due regard by one of the departments of the government for the opinion of another and coördinate department.

In Charlton v. Kelly,[16] the court said: "A construction of a treaty by the political department of the government while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight."

When the courts have given a construction to a treaty, the political departments of the government hold themselves bound thereby. Thus, in the case of Naiorano v. B. & O. R. R. Co.,[17] the Supreme Court had construed the treaty of 1871 between the United States and Italy. In a communication to the Italian Ambassador, the American Acting Secretary of State, referring to this case, said: "This decision of the Supreme Court of the United States is, so far as the Government of the United States is concerned, conclusive as to the meaning of this treaty."[18]

When the meaning of the treaty cannot be certainly determined by an examination of its words, it is held that recourse may be had to the records of the negotiations and diplomatic correspondence leading up to its drafting.[19]

In general, a liberal construction is given to treaties.[20]

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[13] Whitney v. Robertson (124 U. S. 190); Foster v. Neilson (2 Pet. 253).

[14] Scharpf v. Schmidt (172 Ill. 255); Jones v. Meehan (175 U. S. 1); United States v. Arredondo (6 Pet. 691).

[15] Castro v. De Uriarte (16 Fed. 93).

[16] 229 U. S. 447. *Cf.* Sullivan v. Kidd (254 U. S. 433).

[17] 213 U. S. 268.

[18] *Foreign Relations*, 1910, p. 666.

[19] Nielson v. Johnson (279 U. S. 47).

[20] Jordan v. Tashiro, (278 U. S. 123); Nielson v. Johnson (279 U. S. 47).

CHAPTER XXXII

THE AMENDMENT OF THE FEDERAL CONSTITUTION

§ 213. The Amending Clause.

The amendment of the Federal Constitution, while politically a subject of great importance, has given rise to few legal adjudications.

Article V of the Constitution provides: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as parts of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article;[1] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that two methods for proposing, as well as two methods for ratifying proposed amendments are provided. In practice, however, the nineteen amendments which have been added to the Constitution as originally adopted have all been proposed by Congress and that body has in each instance provided for ratification by the State legislatures.

§ 214. States when Ratifying Proposed Amendments Act, Quoad Hoc, as Federal Agencies.

It is clear that when the States ratify proposed amendments to the Federal Constitution, they act, *quoad hoc,* as Federal Agencies; that is, their power so to do is derived wholly from a Federal source. This was emphatically declared in Hawke v. Smith [2] and Rhode Island v. Palmer,[3] and again declared in Leser v. Garnett.[4]

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[1] Art. I, Sec. 9, Cl. 1: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

Art. I, Sec. 9, Cl. 4: "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

[2] 253 U. S. 221.

[3] 253 U. S. 350.

[4] 258 U. S. 130.

When proposing amendments it has been held that two-thirds of those present in the Houses of Congress, a quorum being present, and not two-thirds of their entire membership is required.

Missouri Pacific Ry. Co. v. Kansas,[5] placed this beyond reasonable dispute. The court, after a review of established doctrine as to the overriding of a presidential veto by a two-thirds vote in the two Houses of Congress said: "The identity between the provision of Article V of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto, makes the practice as to the one applicable to the other. . . . In consequence of the identity in principle . . . the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto."

This holding was reaffirmed in Rhode Island v. Palmer.[6]

The requirement of a two-thirds vote applies only to the vote on the final passage of the proposal. Proposed amendments, it has therefore been held, may be amended by a majority vote, but two-thirds are required when one House is voting finally to concur in proposals of the other House.[7]

§ 215. Presidential Approval Not Required.

The President's approval of a proposed amendment is not required. In Hollingsworth v. Virginia [8] Justice Chase without argument said: "The negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution."

§ 216. Finality of State Action.

It would seem that a State legislature which has rejected an amendment proposed by Congress, may later reconsider its action and give its approval.[9] In 1865 the legislature of Kentucky having rejected a proposed amendment the governor of the State, in a recommendation to the legislature, said: "When ratified by the legislatures of three-fourths of the several States the question will be finally withdrawn, and not before. Until ratified it will remain an open question for the ratification of the legislatures of the several States. When ratified by the legislature of a State, it will be final as to such State; and, when ratified by the legislatures of three-fourths of the several States, will be final as to all.

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[5] 248 U. S. 276.

[6] 253 U. S. 350.

[7] Hinds, *Precedents of the House of Representatives*, V, §§ 7029–7039.

[8] 3 Dall. 378.

[9] Jameson, *The Constitutional Convention*, § 576.

Nothing but ratification forecloses the right of action. When ratified, all power is expended. Until ratified, the right to ratify remains."

In the foregoing quotation it is said that a State legislature having once ratified its action is final. Until three-fourths of the States have ratified, any State may withdraw a rejection previously given. This, in fact, was done by several States with reference to the Fourteenth Amendment, and the ratifications thus given were accepted as valid. That a ratification once given may not be withdrawn would also seem to be settled by the action taken by the Federal authorities in counting among those ratifying the Fourteenth Amendment certain States which, having ratified, later attempted to reverse this action.[10]

In Dillon v. Gloss [11] was declared the doctrine that Congress, when proposing amendments for ratification by the States' legislatures, may fix the time within which they may act effectively.

§ 217. May Proposed Amendments Be Ratified by Popular Votes instead of by State Legislatures?

With the employment by certain of the States of the Referendum the question arose whether this legislative authority might be applied to amendments to the Federal Constitution submitted by Congress to the States for ratification, and whether, indeed, this was mandatory in those cases in which the States had by statute or by constitutional provision required that this should be done.

In State of Washington *ex rel.* Mullen v. Howell,[12] and Hawke v. Smith, Secretary of State of the State of Ohio,[13] this question was answered in the affirmative. It was, however, negatived in the Opinion of the Justices of Maine,[14] and *Ex parte* Dillon.[15] The question finally reaching the Supreme Court of the United States in Hawke v. Smith [16] that tribunal held it was not within the constitutional power of either the Federal or State Governments to alter the methods of ratifying proposed amendments to the Federal Constitution which that Constitution itself prescribes; that the word "legislatures" as employed in Article V has the same meaning it had when the Constitution was adopted and means the representative body which makes the laws; that the ratification by a State of a proposed amendment to the Federal Constitution is not a "legislative" act in the ordinary sense of the word; that the power of a State legislature to enact laws is derived from the people of the State, but its power to ratify a proposed amendment to the Federal Constitution is derived from the Federal Constitution; and that, therefore, a State has no authority by statute or State constitutional provision, to provide that a proposed amendment to the Federal Constitution shall be submitted to a popular or referendum vote.[17]

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[10] Jameson, §§ 577–584. But see *contra*, the article "Finality of States' Ratification of a Constitutional Amendment," by F. W. Grinnell, in 11 *Am. Bar. Assn. Journal*, p. 192.

[11] 256 U. S. 368.

[12] 181 Pac. 920.

[13] 126 N. E. 400.

[14] 107 Atl. 673.

[15] 262 Fed. 563.

[16] 253 U. S. 221.

This holding was reaffirmed in Rhode Island v. Palmer.[18]

§ 218. Are There Inherent Limitations upon the Amending Power?

In scope the amending power is now expressly limited as to but one subject, namely, as to the equal representation of the States in the Senate. It has, however, been argued that even this limitation may be evaded by adopting a constitutional amendment eliminating this limitation upon the amending power, and thus opening the way to subsequent amendments providing for unequal representation of the States in the Senate.[19]

It has, however, been strenuously argued by reputable writers that, although not expressly declared, there are limitations as to what may be accomplished by constitutional amendments to the Federal Constitution —limitations which are implied by the very nature of that instrument which, these writers declare, was intended to perpetuate a form of political union in which the States should have control over their own citizen composition and play a distinctive and definitely determined part in the general scheme of government that was to exist. Thus, it has been argued that the Fifteenth Amendment is unconstitutional, because it attempts, against the wills of the States that did not ratify it, to fix the composition of their several electorates.[20] As to this contention, it is sufficient to say that it was disposed of by the case of Texas v. White,[21] in which, speaking of the State of Texas which, at the time of this decision, had not ratified either the Thirteenth or the Fourteenth Amendment, Chief Justice Chase pointed out that by the Thirteenth Amendment the freed negroes, living in the State, necessarily became a part of its people, that the people still constituted the State, and that it was the State, as thus constituted and as a member of the Union, which was entitled to the constitutional guaranty of a government republican in form.

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[17] As was attempted by an amendment of 1918 to the Constitution of Ohio.

[18] 253 U. S. 350.

[19] *Cf.* Von Holst, *Constitutional Law*, p. 31, note.

[20] See, for example, the argument of A. W. Machen in his article "Is the Fifteenth Amendment Void?" in the *Harvard Law Review*, Vol. XXIII, p. 169 (January, 1900). Mr. Machen declares in this article that there has been no decision of the Supreme Court upholding the validity of the Fifteenth Amendment, but he is certainly mistaken as to this, for such a holding was necessarily involved in Neal v. Delaware (103 U. S. 370). As to this see the able article of W. C. Colemen, "The Fifteenth Amendment" in the *Columbia Law Review*, Vol. X, p. 416. In Leser v. Garnett (258 U. S. 130), the court cites, as recognizing the validity of the Fifteenth Amendment, United States v. Reese (92 U. S. 214); Neal v. Delaware (103 U. S. 370); Guinn v. United States (238 U. S. 347); Myers v. Anderson (238 U. S. 368).

[21] 7 Wall. 700.

This disposes of the contention made by some writers that the Nineteenth Amendment, by denying to the States the right to abridge the right to vote on account of sex was in excess of the Federal Amending Power.

Similarly, there have been some who have argued that the adoption of the Eighteenth Amendment was an unconstitutional exercise of the amending power, since it sought to bring within Federal control a matter which, under the Constitution as originally drawn and adopted, it was intended should never be withdrawn from State control. So distinctively different, it is argued by writers taking this ground, is the matter of the regulation of the manufacture, sale, transportation, and exportation and importation of intoxicating liquors from all the other matters subjected by the Constitution to Federal regulation, that the Amendment constitutes an addition to the Constitution rather than an Amendment of it, and, furthermore, such an addition or graft upon it, as to disturb, if not to destroy, its essential character. And, it is declared, this brings the change outside the amending power, since, it is asserted, it could not have been the intention of the framers of the Constitution, or of those who originally adopted it, that, under the amending power, a way should be opened to defeat the essential purpose of the Constitution and thus, as it were, to destroy it.[22]

Space cannot be spared for a full discussion of the points thus raised. It is sufficient to say that, whatever be their merits,—which the author believes to be very slight—the Supreme Court has, in cases too numerous to cite, recognized the validity of the Eighteenth Amendment, and, in Leser v. Garnett [23] deemed the contention as to the invalidity of the Nineteenth Amendment worth only a very summary discussion.

To the author of the present treatise, the fundamental error of all those who have sought to place inherent limitations upon the amending power as provided for in the Federal Constitution is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the States, or that it implies an understanding between them, or between them and the National Government, that the allocation of powers as provided for in the original instrument shall not be changed in any of its more important or essential features. It is surprising to the writer that this theory which, since the Civil War, has been so decisively rejected by the American people and by the courts, should again be brought forward to support a constitutional argument.

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[22] See, for instance, the argument of W. L. Marbury in his article "The Limitations Upon the Amending Power" in the *Harvard Law Review* (December, 1919); and also his article "The Nineteenth Amendment and After," in the *Virginia Law Review*, Vol. VII, p. 1 (October, 1920).

[23] 258 U. S. 130. As to the validity of the Eighteenth Amendment, see Rhode Island v. Palmer (253 U. S. 350).

§ 219. Official Proclamation that an Amendment Has Been Ratified Is Conclusive upon the Courts.

In Leser v. Garnett [24] it was argued that the Nineteenth Amendment had not been validly ratified because several of the States named in the proclamation of the Secretary of State as having ratified, had, in fact, not done so in accordance with the provisions of their several Constitutions. As to this contention the Supreme Court again pointed out that State legislatures, when ratifying proposed amendments to the Federal Constitution, are performing a Federal function and exercising a right derived from the Federal Constitution, the provisions of which transcend any limitations sought to be imposed upon by the States.

In Dillon v. Gloss [25] it was held that a constitutional amendment becomes effective at the time its ratification by the States is consummated, and not from the date when its adoption is proclaimed by the Secretary of State.

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[24] 258 U. S. 130.

[25] 256 U. S. 368.

CHAPTER XXXIII

CONGRESS—ITS ORGANIZATION: PRIVILEGES OF MEMBERS

§ 220. The Name.

The first section of Article I of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Following sections of this article provide for the composition and organization of these two branches of the National legislature and enumerate the powers which they may collectively or severally exercise. In the present chapter we shall be concerned with the constitutional provisions for the organization of Congress.

The term "Congress" is an old one, its international use as the title of formal meetings of heads of sovereign States or their representatives, dating from the seventeenth century.[1] In America the word had been used of such joint conferences as the colonies had convened. When the Articles of Confederation were drawn up, the term was applied to the Confederate administrative and law-making body, and, as was but natural, the same name was given to the legislature provided for in the Constitution which replaced the Articles.

§ 221. Qualifications for Senators and Representatives.

It is required by the Constitution that Representatives shall have attained the age of twenty-five years, have been seven years citizens of the United States,[2] and be, when elected, inhabitants of the State in which they are chosen.[3] Senators are required to be thirty or more years of age, to have been nine years citizens of the United States, and to be, when elected, inhabitants of the State for which they are chosen.[4]

It is furthermore provided by the Constitution that "no person holding any office under the United States shall be a member of either house during his continuance in office." [5]

Furthermore, by Section 3 of the Fourteenth Amendment it is declared that: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability." [6]

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[1] *Cf.* Reinsch, *American Legislatures*, Chapter I.

[2] This requirement was satisfied in the first Congress by assuming that the citizenship demanded could be dated from the time of the Articles of Confederation, if not, indeed, from the Declaration of Independence.

[3] Art. I, Sec. 2, Cl. 2.

[4] Art. I, Sec. 2, Cl. 3.

[5] Art. I, Sec. 6, Cl. 2.

In 1919 the disqualification thus imposed was made the basis for the denial of a seat in the House of Representatives. Representative-elect Victor L. Berger of Wisconsin, had been indicted and convicted in a District Court of the United States for violation of certain provisions of the so-called Espionage Act of June 15, 1917,[7] but from this conviction an appeal was still pending. The Committee to which the Resolution of exclusion was referred, and which reported in favor of its adoption, declared that it had been governed not merely by the action of the trial court, but by other evidence introduced at hearings before the committee. Mr. Berger was refused his seat and a new election was held at which he was again elected and again refused his seat by the House.

It will be observed that habitancy and not mere residency in a State is required. Habitancy implies greater permanency than does residence. "A man's residence is often a legal conclusion from statements showing his intention. Habitancy is a physical fact which may be proved by eye witnesses." [8]

The constitutional provision is that habitancy shall exist at the time of election. It is thus legally possible for a member of Congress, after election, to become the inhabitant of another State without thereby forfeiting his seat.

It is plain that no State may add qualifications to those required by the Constitution of members of Congress. Thus, in 1856, the governor of a State having refused to issue credentials to the rival claimants, because they were disqualified under provisions of the State Constitution to membership in the House, the House seated the one shown *prima facie* by official statement to have a majority of votes.[9] Similar action was taken by the Senate the same year.

The disqualification of a member of Congress, it has been held, does not entitle the person receiving the next highest vote, to his seat.[10]

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[6] Congress has removed this disability from all, or practically all, persons suffering from it because of participation in the Civil War. Delegates from the Territories who are given the right to sit but not to vote in the House of Representatives have their qualifications and terms of office determined by Congress.

[7] 40 Stat. at L., Vol. L, p. 219.

[8] *Cf.* Foster, *Commentaries*, § 62.

[9] Hinds, *op. cit.*, § 415; Story, *Commentaries*, §§ 623–629.

[10] Hinds, § 424.

Members who have already taken the oath may, it has been held, be unseated by a majority vote. That is to say, disqualification being shown, the process of expulsion, which requires a two-thirds vote, is not needed.[11]

In contested election cases each House may examine witnesses, compel testimony and the production of papers, and punish witnesses for contempt.[12] Imprisonment for contempt must, however, cease with the adjournment of the Congress which orders it, for with the dissolution of that body its authority necessarily ceases.[13]

§ 222. Disqualification of Congressmen to Hold Federal Office.

The second clause of Sec. 6 of Article I of the Constitution provides that: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time, and no person holding any office under the United States shall be a member of either House during his continuance in office."

In pursuance of this provision members of Congress have had their seats declared vacant for accepting commissions as officers of the volunteer and regular army forces of the United States. Visitors to academies, directors and trustees of public Federal institutions appointed by law, are not held disqualified.[14]

A State office does not disqualify for membership. Thus, for example, Senator La Follette held the office of governor of Wisconsin until January, 1906, although the Senate, after his election to that body, met in extra session the preceding March. Senator La Follette did not, however, appear in the Senate or take the oath until January 4, 1906.

§ 223. Qualifications Determined by Congress.

Though essentially a judicial function the conclusive determination as to whether the constitutional qualifications for membership have been met is, by the Constitution, placed in the hands of each of the two Houses of Congress. It thus happens that, though neither House may formally impose qualifications additional to those mentioned in the Constitution, or waive those that are mentioned, each may in practice do either of these things. For example, in 1900, the House excluded Brigham H. Roberts of Utah because of various charges brought against him, none of which, however, alleged a constitutional disqualification. In this case it was strenuously argued that, having the necessary constitutional qualifications, Roberts should be admitted to membership, and then, if the House should see fit, he might be expelled by a two-thirds vote. For the right to expel, it is admitted, is absolute, and may be exercised for any reason which the House thinks adequate. The House, however, by a large majority, voted to exclude Roberts.[15]

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[11] Hinds, § 424.

[12] Kilbourn v. Thompson (103 U. S. 168).

[13] Anderson v. Dunn (6 Wh. 204). *Cf. In re* Loney (134 U. S. 372).

[14] House Rpt. 2205, 55th Cong. 3d Sess. In United States v. Hartwell (6 Wall. 385); it is declared that "an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."

See Sen. Rpt. 563, 67th Cong., 2d Sess., in which the opinions of textbook writers, the definitions of dictionaries, and the judicial decisions as to the meaning of the term "office" were reviewed.

There has never been any serious question that the Houses of Congress may go back of the formal certificates of election of persons presenting themselves for membership in order to determine whether, in fact, such persons have actually been elected, or whether there has been so much fraud or other illegal practices at their elections as to furnish ground for vitiating their results.

By a vote taken on January 19, 1928, the Senate excluded from its membership Frank L. Smith upon the ground that his primary election had been tainted by reason of the acceptance and expenditure in his behalf of certain large sums of money.[16] The first paragraph of the resolution of exclusion read: "*Resolved*, That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith."

The Senate and House have repeatedly held it to be proper that they should consider whether or not persons should be admitted as Senators or Representatives even though possessing all the qualifications prescribed by the Constitution for membership and presenting credentials in due form of their election. It is, however, to be observed that in these instances, the inquiries or action, except in the Smoot case,[17] were predicated upon alleged facts which, if proved, would have tended to render irregular or invalid the elections of the Senators or Representatives concerned; and, in the Smoot case, the final resolution was made to require for its adoption a majority that would have been sufficient to bring about his expulsion from the Senate.

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[15] For a full statement of the arguments *pro* and *contra* in this important case, see House Rpt. 85, 56th Congress, 1st Session. Also Hinds, *Precedents of the House of Representatives*, Vol. I.

[16] It was considered especially objectionable that some of these moneys were contributed by corporations whose interests were likely to come before the Illinois Commerce Commission of which Mr. Smith was, at the time, chairman.

[17] Reed Smoot was refused a seat in the Senate in 1903.

§ 224. Right of Expulsion.

The Constitution provides (Art. I, Sec. 5, Cl. 2) that "Each House may . . . with the concurrence of two-thirds, expel a member."

This right of expulsion is to be sharply distinguished from the right to refuse to admit to membership. In the latter case, as has been seen, the questions involved are, in the main, and perhaps exclusively, those which relate to the constitutional qualifications of those persons presenting themselves for admission or to the regularity and legality of the elections at which such persons have been selected or appointed. In the former case, that is, of expulsion, these matters may be considered, but, in addition, action may be predicated upon the personal character or acts of the parties concerned; and, as to this last matter, as will presently be seen, the chief point of controversy has been whether the acts of which complaint is made should be only those which have occurred subsequent to election and have a bearing upon the dignity of Congress and the due performance of its functions. With the acts of members-elect committed prior to their election it has been strongly argued that the Houses should not concern themselves since the electorates should be conceded to have the right to select whom they wish to represent them in Congress, and that they should be presumed to have taken account of the characters and conduct of those whom they select.

A disregard of the foregoing doctrine, it has been vainly urged, operates as a denial to the States of a right or privilege constitutionally provided for them.

In determining whether or not a member of Congress has been guilty of such acts as to warrant his expulsion, the House concerned does not sit as a criminal trial court, and is not, therefore, bound by the rules of evidence, and the requirements as to certitude of guilt which prevail in a criminal court. In other words, the question at issue is not as to guilt of a criminal character, but only as to unfitness for participation in the deliberations and decisions of Congress. In this respect, the proceedings are similar to those of impeachment.[18]

§ 225. Privileges of Members of Congress.

The first clause of the Sixth Section of Article I of the Constitution provides: "The Senators and Representatives . . . shall in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place."

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[18] See the report of the Select Committee in the cases of Oakes Ames and James Brooks. Hinds' *Precedents*, Vol. II, p. 1286. See also H. Rpt. 570, 63d Cong., 2d Sess., pp. 47, 52.

The exemption from arrest thus given is now of little importance, as arrest of the person is now almost never authorized except for crimes which fall within the classes exempt from the privilege. The words "treason, felony and breach of the peace" have been construed to mean all indictable crimes.[19]

As regards the freedom of the members of Congress from prosecution for words spoken in either House, no comment is needed, except to observe that this privilege does not extend to the outside publication by a member of libelous matter spoken in Congress. As Story observes: "No man ought to have a right to defame others under color of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation and invade the repose of other citizens." [20]

It may be further observed that the constitutional immunity extends to witnesses appearing before committees of Congress, and, probably, to authors of petitions, and other addresses to that body.[21]

In 1876, certain members of the House reported that they had been summoned by the Supreme Court of the District of Columbia to bring certain documents in their possession or in the possession of a committee of the House to be used in pending criminal proceedings and "to attend the said court immediately to testify on behalf of the United States and not to depart from the court without leave of the court or district attorneys," and that they had attended the court. Whereupon the House adopted a resolution declaring that the mandate of the court had been a breach of the privileges of the House and that members be directed thereafter to disregard the mandate until further order of the House.[22]

So, also, in the same year, certain members of the House reported that they had been summoned to appear before a grand jury of the District of Columbia, and, understanding that they might not, without the consent of the House, waive their constitutional immunity to such process, submitted the matter to the House, whereupon the House, by Resolution, authorized them to appear and testify under the said summons.[23]

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[19] Williamson v. United States (207 U. S. 425). Also, Hinds, § 2673. In Kilbourn v. Thompson (103 U. S. 168), is considered the personal liability of the individual members of Congress who had participated in a commitment for contempt which commitment was beyond the constitutional power of Congress.

[20] *Commentaries*, § 863.

[21] See the excellent paper by Mr. Van Vechten Veeder entitled "Absolute Immunity in Defamation: Legislative and Executive Proceedings," in the *Columbia Law Review*, Feb., 1910.

[22] Hinds' *Precedents*, Vol. III, § 2661.

In 1910, several members of Congress having been served with a writ of mandamus in a civil action brought against them as members of the Joint Committee on Printing and growing out a refusal of a bid of the Valley Paper Company, for the furnishing of paper, the Senate resolved that the Justice issuing the writ had "unlawfully invaded the constitutional privileges and prerogatives of the Senate of the United States and of three Senators; and was without jurisdiction to grant the rule, and Senators are directed to make no appearance thereto." [24]

§ 226. Power of Congress to Punish for Contempt.

That Congress has the power to punish its own members for disorderly behavior and that it may punish by imprisonment a refusal to obey a rule made by it for the preservation of its own order and inflict penalties in order to compel the attendance of absent members, has not been questioned.

That Congress has also the inherent power to punish persons interfering in any way with the performance by itself as a body, or by its members, of its or their constitutional duties, is equally clear and has been repeatedly exercised. Within this power is embraced the right to punish persons for personal assaults upon members of Congress because of what they may have said or done in the exercise of their rights or the performance of their duties as Congressmen. Upon a number of occasions the persons charged with such acts have been summoned to the bar of the House or of the Senate and reprimanded, and, in one case, that of Patrick Wood in 1870, who had assaulted a member of the House of Representatives, the offending one was subjected by warrant of the House to three months' imprisonment in the jail of the District of Columbia.[25] A comparatively recent instance of the exercise of this power of the House of Representatives to punish grew out of the assault by one C. C. Glover upon Representative Sims in 1913.[26]

In 1821 the Supreme Court by a decision rendered in the case of Anderson v. Dunn [27] recognized the existence in Congress of a general power to punish for contempt persons disobeying its orders. In the case of Kilbourn v. Thompson,[28] however, decided in 1881, the court very much narrowed this power, holding that the power of Congress to punish for contumacy the refusal of a witness to testify before either of its Houses may be exercised only when the testimony is required in a matter regarding which the House concerned has the right to inquire. In this respect, being a legislature of limited powers, Congress could not measure its powers by those exercised by the English Parliament. Applying the foregoing principles the court in its opinion said: "In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of the opinion that the House of Representatives not only exceeded the limit of its own authority but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial."

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[23] Hinds' *Precedents*, Vol. III, § 2662.

[24] See H. R. Doc. 806, 61st Cong., 2d Sess.

[25] In this case it appears that the assault was not because of any words spoken by the member in debate, but the result was to impede or delay his return to his place in the House.

[26] See H. Rpt. 6, 63d Cong., 1st Sess., for a statement of the power of the House in the premises.

[27] 6 Wh. 204.

In the case *Re* Chapman,[29] however, decided in 1897, was raised the question whether the Senate had the authority to punish a refusal to testify before a committee which was inquiring with reference to the truth of charges which had been made reflecting upon the integrity of certain of its members and which, if proved, might furnish a basis for their expulsion. This power the court upheld.

The court, furthermore, held in this case that, having the power, Congress might, instead of, or in addition to, itself punishing for contempt, provide by law that a contumacious witness be indicted and punished in the courts for a misdemeanor.

With reference to the authority of the State legislatures to punish for contempt it may be observed that their powers are much broader than those of Congress. Possessing all powers not expressly or impliedly refused them, they have been held to have a general inquisitorial power and a corresponding general authority to punish a refusal to testify or to produce papers.

In the comparatively recent case of Marshall v. Gordon,[30] the Supreme Court took occasion to review the entire question as to the extent of the power of the Houses of Congress to punish for contempt in the light of the fundamental principle of the American Constitution regarding the separation of powers. This power to deal directly by way of contempt proceedings, that is, without criminal prosecution, the court found to be implied in the right of Congress to preserve itself against acts which inherently obstruct or prevent the discharge of legislative duties, and limited to that end, and, therefore, that there was not congressional power, by contempt proceedings, to punish a person, not a member of

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[28] 103 U. S. 168.

[29] 166 U. S. 661.

[30] 243 U. S. 521

Congress, for writing and publishing a letter addressed to the Chairman of a sub-committee of the House, which letter contained matter deemed defamatory to the House or to its Committee.

The court went on to point out that, except in two or three cases, all the instances in which the Senate or House of Representatives had exerted its power to deal with contempt had had to deal with physical obstruction to the legislative body in the discharge of its duties, or to physical assaults upon its members for action taken or words spoken in Congress, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or, finally, with contumacy in refusing to give testimony when there was a right to compel. In the two or three instances in which the Houses of Congress had gone beyond this, it would appear, said the court, that they had overlooked the distinction which exists "between the legislative power to make criminal every form of act which can constitute a contempt, to be punished according to the orderly process of law, and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority."

§ 227. The Inquisitorial Powers of Congress.

The extent of the inquisitorial powers of Congress, that is, of its authority to summon witnesses, to require the production of documents, and to punish, as for contempt, refusal to appear and testify or to produce the documents or other evidence demanded, has appeared in the discussion, in the preceding sections, of the punitive powers of Congress. In general it may be said that Congress is constitutionally qualified to obtain, by compulsory process if necessary, violation of which may be punished as contempt, all information that will aid it, or either of its Houses, in performing the duties imposed upon it or either of its branches, by the Constitution. This competency extends to matters of admission or expulsion of members, to the determination of contested elections of members, to the confirmation of appointments, to the ratification of treaties, to the presentation of articles of impeachment, and the trial of persons thus impeached, and to all cases in which proceedings are had upon charges reflecting upon the integrity of its members, or for the purpose of maintaining their constitutional privileges as members. It is reasonably clear, however, that, in the exercise of these powers, Congress is limited by express prohibitions of the Constitution as regards unreasonable searches and seizures, self-incrimination and the like.

In 1924 a Committee of the Senate was authorized to investigate circumstances and facts and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Antitrust Act and the Clayton Acts against monopolies and unlawful restraint of trade; and the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute properly, efficiently, and promptly and defend all manner of civil and commercial actions wherein the Government of the United States is interested as a party plaintiff or defendant. "And . . . further . . . to inquire into, investigate, and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States." For these purposes the Resolution creating the Committee authorized it to send for persons, books, and papers and to administer oaths.

The constitutional authority of the Senate, for the foregoing purposes, to compel testimony and the production of relevant documents was upheld by the Supreme Court in the case of McGrain v. Daugherty.[31] In its opinion the court declared the principal questions involved to be of "unusual importance and delicacy," being "(a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution; and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose."

These questions were presented in their fundamental character, for, as the court pointed out, the defendant was not questioning the right of the Senate Committee to require from him answers to specific questions, but to interrogate him at all.

In actual legislative practice, the court pointed out, the power to secure information as an attribute of the power to legislate had been asserted by American legislative bodies since before the Revolution, as well as by the British Parliament, and this practice had been generally upheld by State courts.[32] Furthermore, Congress had, by various enactments, asserted its power to obtain information by providing for the administration of oaths or affirmations to witnesses before itself or its committees,[33] and for their punishment, by criminal judicial proceedings, when contumacious.[34] After reviewing the cases of Anderson v. Dunn,[35] Kilbourn v. Thompson,[36] *In re* Chapman,[37] and Marshall v. Gordon [38] and pointing out that in the Kilbourn case, in which the action of Congress had not been sustained, the resolution of inquiry had contained no suggestion of contemplated legislation, and that the matter involved was one in respect to which Congress had no power to legislate, the court, in the instant case said: "While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied." [39]

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[31] 273 U. S. 135, 154, 173, 174, 177.

[32] Citing, or quoting from Burnham v. Morrisey (14 Gray, 226); Wilckens v. Willet (1 Keyes, 521); People v. Keeler (99 N. Y. 463); *Re* Falvey (7 Wis. 630); State v Frear (138 Wis. 173), and other cases.

"We are of opinion," the court concluded, "That the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body can not legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information —which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."

As to whether, in the instant case, the inquiry was one which could properly be held ancillary to the legislative powers of Congress, the court said: "It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year."

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[33] Act of May 3, 1798, 1 Stat. at L. 554; act of February 8, 1817, 3 Stat. at L. 345.

[34] Act of January 24, 1857, 11 Stat. at L. 155.

[35] 6 Wh. 204.

[36] 103 U. S. 168.

[37] 166 U. S. 661.

[38] 243 U. S. 521.

[39] This last proposition, the court said, was supported in Harriman v. Interstate Commerce Commission (211 U. S. 407); and Federal Trade Commission v. Am. Tobacco Co. (264 U. S. 298).

In Sinclair v. United States [40] the court again examined the question as to the extent of the inquisitorial powers of Congress or of either of its two Houses, or of their committees, and upheld the authority of a committee of the Senate to obtain information regarding the naval oil reserves and other public lands and property of the United States, and as to the manner in which laws relating thereto had been administered by the executive departments, and as to their practical effect.

In Barry v. United States *ex rel.* Cunningham [41] was again examined and upheld the power of the Houses of Congress to take such steps as might be necessary to secure information for their guidance in judging the election returns and qualifications of their own members.

In this case it was declared that the power to investigate regarding the validity of the election of a member was not ousted by reason of the refusal of the Senate to admit to membership one presenting himself for admission pending such investigation. Also that such a refusal does not violate the provision of Article V of the Constitution with regard to the equal representation of the States in the Senate. That provision, the court declared, relates merely to the power to amend the Constitution.

§ 228. Power of Congress to Vest Power to Compel Testimony in Agencies Created by Itself.

Closely connected with the power of the Houses of Congress themselves or through their Committees to compel testimony is the question as to the constitutional power of Congress to create regulatory or fact-finding bodies with the authority to compel testimony. This question will receive specific examination with reference to the authority in this respect vested in the Interstate Commerce Commission, the Federal Trade Commission and the United States Shipping Board when the nature and powers of these bodies are examined. The matter is also one which will need consideration in connection with the subjects of the separation of powers and due process of law. It may be here pointed out, however, that such inquisitorial power has been vested by Congress in a considerable number of other bodies, such, for example, as the Rent Commission of the District of Columbia, the United States Labor Board, the United States Tariff Commission, the Commissioner of Patents, the Commissioner of Immigration, and the Commissioner of Internal Revenue; and even in private individuals acting as arbitrators under the Federal Arbitration Act of 1923, the Erdman Act of 1898 for the settlement of labor disputes, and the Newlands Irrigation Act of 1922.

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[40] 279 U. S. 263.

[41] 279 U. S. 597.

CHAPTER XXXIV

ELECTION OF MEMBERS OF CONGRESS

§ 229. Their Apportionment among the States.

The Constitution provides that the House of Representatives shall be composed of members chosen every second year by the people of the several States, and that they shall be apportioned among the States according to their several populations, the whole number of persons in each State, excluding Indians not taxed, being counted. The Fourteenth Amendment further provides that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This amendment thus left it within the constitutional power of the States to place such restrictions as they might choose upon the exercise of the suffrage within their limits, but subject to a reduction in the number of representatives to which they are entitled in Congress to the extent to which the right to vote is denied to adult male inhabitants, citizens of the United States.

The Fifteenth Amendment, adopted two years later, placed the absolute prohibition upon the States that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color or previous condition of servitude." And the Nineteenth Amendment, adopted in 1920, declares that "the right to vote shall not be denied or abridged by the United States or by any State on account of sex."

As is well known, most of the Southern States have, by various provisions inserted in their several constitutions, in large measure eliminated the negro vote. This has led to a certain amount of agitation both in the public press and in Congress for the enforcement of the reduction of representation clause of the Fourteenth Amendment, but as yet no decisive steps have been taken.

In various States of the Union property, educational, and other qualifications upon the right to vote have been established. These limitations upon adult male suffrage have not, however, led to any attempt by Congress to apply the reduction of representation clause of the Fourteenth Amendment.[1]

§ 230. The Mode of Apportionment.

In the first Congress representatives were apportioned among the States according to a rough estimate as to their respective populations. Since that time new apportionments have been based upon the figures of the decennial censuses.

There are no instances in which the courts have attempted to revise the apportionment of representatives by Congress. As regards, however, the determination by the States of districts for the election of the members of their respective State legislatures, the State courts have frequently interfered upon the ground that the districting has been in violation of State constitutional provisions regarding equality of representation.

The last reapportionment of Representatives is that of 1911 which fixed the number of Representatives at 433. This number has since been increased by two by the admission to the Union as States of Arizona and New Mexico with one Representative each. The act of 1911 changed somewhat the method of apportionment which had previously been applied.[2]

§ 231. Congressional Districts.

The division of the States into congressional districts for the purpose of selecting representatives is left to the State legislatures. Congress has, however, provided that these districts shall be composed of contiguous territory. It has become an established rule of political practice, though not one of constitutional obligation, that a representative shall be a resident of the district in which he is elected. Representatives are, however, occasionally elected by districts in which they do not reside, and in such cases there has been no question as to their right to sit. In certain cases, congressmen at large, that is, from the whole State, are elected. This happens when a State has not been divided into districts, or where, after a reapportionment, additional representatives have been allotted to a State and that State has not redistricted itself so as to provide the necessary additional districts. In such cases, of course, only the additional representatives are elected at large.

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[1] The State courts have very generally held that reasonable registration and other laws for the protection of the voter against fraud, intimidation, ignorance, etc., are not unconstitutional under the State Constitution as adding to the qualifications laid down. *Cf.* Cooley, *Const. Lim.*, 7th ed., Ch. XVIII.

[2] See, generally, the excellent article "Congressional Reapportionment" by Prof. Zechariah Chafee, Jr., in 42 *Harvard Law Review*, 1015. As to the methods of reapportionments to be pursued in the future, see section 22 of the Act of Congress of June 18, 1929.

§ 232. Suffrage Qualifications.

The Constitution provides that for the election of Representatives to Congress, "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." This places the regulation of the suffrage wholly within the control of the several States, except for the restriction placed upon them by the Fifteenth and Nineteenth Amendments. There thus exists the rather curious fact that the National Government, though able to control its citizenship by naturalization, is not able to confer the suffrage for the election even of its own officials; whereas the States may confer, and, indeed, in a number of instances, have conferred, this suffrage upon persons not citizens of the United States.

That the suffrage is not a necessary incident of Federal citizenship is declared by the Supreme Court in Minor v. Happersett,[3] a case in which it was argued that a woman, a citizen of the United States, was, as such, entitled to a vote.

Although, as appears from the foregoing, the right of determining the conditions upon which the suffrage is granted lies exclusively within the discretion of the several States, subject only to the limitations of the Fifteenth and Nineteenth Amendments, it may happen that State suffrage laws may be rendered invalid because in violation of certain other general limitations laid upon the States. Thus, for example, a disfranchising law, operating as to particular individuals as a bill of attainder, or as *ex post facto* law, or as tending to destroy a republican form of government in the State, or as favoring the citizens of certain States above those of other States, would probably be held void.[4]

A distinction is to be made between the right to vote for representatives in Congress and the conditions upon which that right is granted. In the preceding paragraphs it has been shown that the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined, is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that representatives shall be elected by those who have the right in each State to vote for the members of the most numerous branch of the State legislature. The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their own several State legislatures.[5]

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[3] 21 Wall. 162. See also United States v. Reese (92 U. S. 214); United States v. Cruikshank (92 U. S. 542); Pope v. Williams (193 U. S. 621), and Neal v. Delaware (103 U. S. 370).

[4] Pope v. Williams (193 U. S. 621).

§ 233. Enforcement Clauses of the Fifteenth and Nineteenth Amendments.

By the second sections of the Fifteenth and Nineteenth Amendments Congress is given power to enact laws necessary for the enforcement of the prohibitions expressed in their first sections.

The Federal authority thus granted, it is to be observed, has reference to all elections whether State or Federal. In this respect it is thus much broader than that given in Section 4 of Article I. In other respects, however, the power granted is much narrower, for it authorizes Federal intervention only in cases where the right to vote has been denied or abridged on account of sex, race, color, or previous condition of servitude. Thus in United States v. Reese [6] an act of Congress which made it a crime to hinder, delay or restrict any citizen from doing any act to qualify him to vote or from voting at any election, was held void because its operation was not confined to cases in which the interference was on account of race, color, or previous condition of servitude.

In James v. Bowman,[7] it was held that the prohibition of the Fifteenth Amendment is directed against State action and that, therefore, there was no constitutional warrant under that Amendment for a Federal statute, applicable to State as well as to Federal elections, which declared punishable the prevention by private persons, acting without any State authority, of persons from exercising the right of suffrage guaranteed by the Amendment. In the instant case the offence charged occurred at or in connection with a congressional election, but the court held that, by the statute in question, Congress had not attempted to exercise its general authority to regulate or protect the voter at Federal elections, but, acting in pursuance of an authority claimed to be given by the Fifteenth Amendment, had made its statute applicable to State as well as Federal elections. The court declined, by construing the statute as applicable only to Federal elections, to render it constitutional.

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[5] *Ex parte* Yarbrough (110 U. S. 651); Wiley v. Sinkler (179 U. S. 58); United States v. Mosley (238 U. S. 383).

[6] 92 U. S. 214.

[7] 190 U. S. 127.

§ 234. Disfranchisement Clauses of the Constitutions of Certain Southern States.[8]

As has been before adverted to, most, if not all, of the Southern States in which the negro population is very considerable, have, by means of constitutional amendments or in constitutions newly adopted, secured in effect the almost total disfranchisement of their colored citizens. This, however, has been done, not by disfranchisement provisions expressly directed against the negroes, but by requiring all voters to be registered, and by placing conditions upon registration which very few negroes are able to meet, or, at any rate, to satisfy the registration officers that they do meet them.[9]

§ 235. Remaining Power of the States to Control the Suffrage and Eligibility to State Offices.

It is reasonably clear that the States still retain power to limit the right of suffrage to particular classes of their citizens except as regards exclusions based upon sex, race, color, or previous condition of suffrage.[10] It is barely possible, however, that an exclusion which is wholly unreasonable or arbitrary in character would be held a denial to those excluded of due process of law or the equal protection of the laws, for it has been held that the right to vote is of substantive value for the illegal denial of which compulsory damages may be awarded.[11] It might also be argued with some degree of reason that such an arbitrary denial of the right of suffrage to any considerable number of citizens would operate to render the State government no longer republican in form. It would be difficult, however, and probably impossible, to obtain a judicial pronouncement upon this point.

As to eligibility to public office it seems clear that the States have a similar constitutional power, and, moreover, one not limited by the prohibitions of the Fifteenth and Nineteenth Amendments.

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[8] For an excellent account of the devices employed by certain of the States to exclude negroes from the suffrage, see Sait, *American Parties and Elections*, Chapter II.

[9] There have been a considerable number of cases in the Supreme Court dealing with alleged unconstitutional denials to negroes of their right to the suffrage. For a discussion of them, see the author's larger work, *The Constitutional Law of the United States*, vol. II, § 353. But see especially Guinn v. United States (238 U. S. 347); and Myers v. Anderson (238 U. S. 386).

[10] In Guinn v. United States (238 U. S. 347), the court said: "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

[11] See Wiley v. Sinkler (179 U. S. 58) and Nixon v. Herndon (273 U. S. 536).

§ 236. Federal Control of Congressional Elections.

According to the Constitution, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

In this clause sufficient authority is given the Federal Government, should it so see fit, to assume entire and exclusive control of the elections of Senators and Representatives; to establish by acts of Congress the regulations governing the same, and to apply and enforce these regulations by Federal officials and tribunals.

The United States government did not exercise any of the power thus given it until 1842 when, conceiving that the system employed in some States of electing all the members of the House of Representatives upon a general ticket (that is, one according to which each voter voted for as many Representatives as there were Representatives to be elected from his State) gave an undue power to the political party in the majority in the State, Congress enacted a law declaring that each member should be elected by a separate district composed of contiguous territory.[12] In 1866 an act was passed regulating the election of Senators by the State legislatures.[13]

In 1870 Congress, for the first time, enacted laws dealing comprehensively with congressional elections.[14] These acts, as amended and supplemented in 1872,[15] provided extensive regulations regarding false registration, bribery, voting without legal right, false returns, interfering with officers of election, neglect of duty by such officers, appointment of persons to attend at places of registration and at elections with power to challenge and to witness the counting of votes and to identify signatures of voters, and the preservation of order at elections by special deputy marshals of the United States, with authority to arrest for breaches of the peace committed within their view.

In 1894, however, all of these provisions, with a few exceptions, were repealed.[16] There were, however, left in effect the provisions now in Sections 19 to 26, constituting Chapter III of the Criminal Code which is entitled "Offenses Against the Elective Franchise and Civil Rights of Citizens." These provisions, as the title of the chapter shows, have for their purpose the protection of the citizen against the violation of his elective and civil rights, but make no attempt to regulate in an affirmative and specific manner the conduct of congressional elections.

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[12] 5 Stat. at L. 491.

[13] 14 Stat. at L. 243.

[14] Sections 17–22, act of May 31, 1870, 16 Stat. at L. 144; and Sections 5 and 6 of the act of July 14, 1870, 16 Stat. at L. 256.

[15] Act of June 10, 1872, 17 Stat. at L. 347.

[16] Act of February 8, 1894, 28 Stat. at L. 36.

This right of oversight as asserted by Congress in the laws of 1870 and 1872 was contested by some of the States upon the ground that, though the United States might establish regulations of its own, appoint officials to execute them, and compel the officials of the State as well as private citizens to conform to them, it had no right or power to control State officials in the execution of the laws enacted by their own States, even when those laws related to the election of members of the National legislature.

This controversy reached a judicial settlement in the case of *Ex parte* Siebold,[17] decided in 1879, in which the Federal authority was upheld, the court holding that the State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress.

In *Ex parte* Clarke [18] and *Ex parte* Yarbrough [19] the doctrine declared in Siebold's case was reaffirmed, the court saying in the latter case, "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect its elections from violence and corruption."

§ 237. Federal Corrupt Practices Act.

Congress has, by various laws, enacted in 1907, 1909, 1910, 1911, 1912 and 1925, provided for the punishment of corrupt practices in congressional elections.[20] The present act, known as the "Federal Corrupt Practices Act, 1925," [21] constitutes Title III of the act of February 28, 1925, reclassifying salaries of postmasters, etc. Its especial purpose is to regulate expenditures and to require that publicity be given to campaign contributions. It furthermore limits the amounts that candidates may lawfully make in their campaigns for election, and declares it unlawful for any candidate, directly or indirectly, to promise or pledge the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment for the purpose of securing support in his candidacy, or to make or offer to make any expenditure, or to cause an expenditure to be made or offered, to any person, either to vote or to withhold his vote, or to vote for or against any candidate, or for any person to solicit, accept or receive any such expenditure in consideration of his vote or the withholding of his vote. State laws relating to the nomination or election of candidates, are declared to be not annulled unless directly inconsistent with the act of Congress.

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[17] 100 U. S. 371.

[18] 100 U. S. 399.

[19] 110 U. S. 651. In this case the law of 1870 was held to support an indictment charging a conspiracy to intimidate a citizen of African descent from voting. See Rev. Stat., §§ 2208, 5520.

[20] Including special as well as general elections, and the election of a Resident Commissioner by the Philippine legislature.

[21] 43 Stat. at L. 1070.

The constitutional power of Congress to make provisions for the fair and honest election of Senators and Representatives is not open to question.[22]

The Federal Corrupt Practices Act of 1925 is expressly made not applicable to "primary" elections or conventions of political parties.

In Newberry v. United States,[23] four of the justices declared that it was their opinion that Congress did not have the constitutional power to regulate party primaries or conventions held for the purpose of designating condidates at congressional elections. Although all of the other justices concurred in the judgment in the Newberry case, four of them declared that the power of Congress did constitutionally extend to the control of primary or nominating elections. The ninth justice expressly reserved his opinion upon this point. It cannot be said, then, that it has been judicially determined whether or not Congress has the power in question, although, as has been pointed out, Congress saw fit expressly to state that its Corrupt Practices Act of 1925 should not apply to party primaries and conventions.[24]

§ 238. Election of Senators.

Prior to the adoption of the Seventeenth Amendment the Constitution provided that Senators in the Federal Congress should be chosen by the legislatures of the several States, and that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but that Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

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[22] *Ex parte* Coy (127 U. S. 731).

[23] 256 U. S. 232. This case arose out of the conviction of T. H. Newberry and others of conspiring to violate the Federal Corrupt Practices Acts of 1910 and 1911, upon the occasion of the nomination of Newberry as candidate for election to the Senate of the United States. The court did not say that the situation would have been different had the act of Congress been passed after the adoption of the Seventeenth Amendment. The court did, however, refer to the fact that the act antedated that Amendment.

[24] *Cf.* United States v. Gradwell (243 U. S. 476).

Not until 1866 did Congress exercise the control over the election of Senators thus given it. Prior to that date the Senate had recognized the validity of elections based on majority votes in joint conventions of the two Houses of the State legislatures, where a concurrent choice of the two Houses sitting separately was not obtained. It was held, however, in the case of James Harlan, 1857, that in such joint conventions a quorum of both Houses must be present.

By the act of 1866 the entire matter was Federally determined.[25] In the case of James B. Eustis, the Senate held that, under this law, an election made by a majority vote in a joint convention was valid, even though there was not present a quorum of one of the Houses.

§ 239. Popular Election of Senators.

The Seventeenth Amendment, adopted in 1913, reads as follows:

"(1) The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

"(2) When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

"(3) This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

Some occasions for controversy have arisen under Section 3 of this Amendment, but otherwise the Amendment has not given rise to judicial or congressional determinations that need to be here considered.[26]

§ 240. Vacancies in the Senate.

It is provided by Article I, Section 3, Clause 2 of the Constitution that "if vacancies happen [in the Senate] by resignation, or otherwise, during the recess of the legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

This provision has, of course, been superseded by Section 2 of the

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[25] 40 Rev. Stat., §§ 14–19.

[26] As to controversies which arose with reference to the appointment of F. P. Glass as Senator from Alabama, see Sen. Docs. 164, 170, and 241, 63d Cong., 1st Sess. As to the election of Blair Lee as Senator from Maryland, see Senate Rpt. 160, 63d Cong., 2d Sess., Parts 1, 2 and 3.

Seventeenth Amendment, but, inasmuch as that section employs the same phraseology as to the "happening" of vacancies, the interpretation that has been given to Clause 2 of Section 3, Article I is still of precedential force.

There has been considerable difference of opinion as to the proper construction to be given to the term "happen" as employed in the foregoing constitutional clause. By some it has been contended that a vacancy "happens" whenever, for any reason whatever, there is a vacancy in the representation of a State in the Senate. By others, it is asserted, that where a State legislature has had the opportunity to elect a Senator and has failed to do so, it cannot be said that a vacancy has "happened" but that it has been present and brought about by the non-action of the State electoral body, and that that body had thus impliedly shown that it did not desire the vacancy to be filled. This was the position taken by the Senate in 1900 in the case of Senator Quay from Pennsylvania.[27]

The senatorial practice has not been uniform in respect to executive appointments to fill vacancies, but its action in the Quay case has probably determined the doctrine for the future.

§ 241. Vacancies in the House of Representatives.

When vacancies happen in the representation from any State, it is provided that the executive authority thereof shall issue writs of election to fill such vacancies.

Vacancies are occasioned by death, by resignation, or by acceptance of a disqualifying office.[28]

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[27] See Sen. Rpt. 153, 56th Cong., 1st Sess.

[28] Van Ness Case (Cl. & H. 122).

CHAPTER XXXV

THE PROCESS OF LEGISLATION AS CONSTITUTIONALLY DETERMINED

§ 242. Constitutional Provisions.

To a certain extent the manner of conducting business in Congress, and the processes of legislation, are determined by the Constitution. It is provided that the Vice-President shall be the President of the Senate, but shall have no vote except in case of a tie. The Senate, however, is empowered to choose its other officers, including the President *Pro Tempore*[1] to preside in the absence of the Vice-President or when he is exercising the office of President of the United States. The House is empowered to choose all of its officers, including its presiding officer, the Speaker.

It is required that Congress shall assemble at least once in every year, and that such meeting shall be on the first Monday in December, unless by law a different day is appointed.

A majority of each House is fixed as a quorum to do business, but a smaller number is competent to adjourn from day to day, and to compel the attendance of absent members in such manner and under such penalties as each House may provide.

Each House is authorized to determine the rules of its procedure, to punish its members for disorderly behavior, and, as we have seen, with the concurrence of two-thirds to expel a member.

Neither House may, without the consent of the other House, during a session of Congress adjourn for more than three days, nor to any other place than that in which the Houses are sitting.

Each House is required to keep a journal of its proceedings, and from time to time to publish the same, excepting such parts as may in its judgment require secrecy; and it is ordered that, at the desire of one-fifth of those present, the yeas and nays of members of either House on any question shall be entered on this journal.

The foregoing constitutional provisions impose duties upon and grant powers to the two Houses of Congress, the fulfilment and exercise of which are placed within the discretion of the Houses themselves. Very few questions arising under these clauses have, therefore, been, or could have been, brought before the courts. One important point has, however, been raised and deserves attention. This is discussed in the next section.

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[1] See Sen. Doc. 30, 62d Cong., 1st Sess., for discussion of the office of President *Pro Tempore* of the Senate.

§ 243. Conclusiveness of the Records of Congressional Proceedings.

In a few instances the validity of laws purporting to have been enacted by Congress has been questioned upon the ground that they have not, in fact, been enacted by that body in accordance with the requirements of the Constitution. This is determinable only by an examination of the records of the proceedings of Congress and raises the question as to the evidential value to be given to those records.

In Field v. Clark [1a] it was contended by the appellants that an enrolled act in the custody of the Secretary of State, and appearing upon its face to be a law enacted by Congress, was a nullity, because, as was shown by the records of proceedings in Congress, and the reports of committees, including that of the committee on conference, a section of the bill as finally passed was not in the bill authenticated by the signatures of the presiding officers of the two Houses and signed by the President. The court, however, declared that the attestation of the Speaker of the House and of the President of the Senate, the signature of the President of the United States, and the deposit of a measure as a law in the public archives are to be taken as unimpeachable evidence that the constitutional requirements for legislation have been satisfied, and that the measure as thus certified to has received the approval of the legislative branch of the government.

In United States *v.* Ballin[2] the evidential value of records of congressional proceedings was again considered, the court saying: "Assuming that . . . reference may be had to the Journal . . . and assuming, though without deciding, that the facts which the Constitution requires to be placed on the Journal may be appealed to in the question whether a law has been legally enacted, yet if reference may be had to such Journal, it must be assumed to speak the truth."

§ 244. Constitutional Force of Rules of the House and Senate.

In United States v. Ballin[3] was also raised an interesting question as to the constitutional validity of a certain rule of procedure adopted by the House of Representatives. As to this the court, in its opinion, said: "The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other method would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

[1a] 143 U. S. 649.

[2] 144 U. S. 1. *Cf.* Field v. Clark (143 U. S. 649); and Flint v. Stone Tracy Co. (220 U. S. 107).

[3] 144 U. S. 1.

§ 245. Revenue Measures.

The Constitution provides that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." [4]

This provision has given rise to frequent controversies between the two Houses of Congress, but has but seldom been passed upon by the courts. No formal definition of a revenue measure has been given by the Supreme Court, but in Twin City National Bank v. Nebeker [5] the court, in effect, held that a bill, the primary purpose of which is not the raising of revenue, is not a measure that must originate in the House, even though, incidentally, a revenue will be derived by the United States from its execution.

The House has, upon a number of occasions, refused to agree to or to consider senatorial amendments to revenue measures upon the ground that the amendments have enlarged the scope or changed the character of the measure as originated in the House. Especially has the House denied, and the Senate insisted upon, its right to originate measures which repeal a law or portion of a law imposing taxes, duties, imposts or excises.

§ 246. Appropriation Acts.

It would seem that the Senate has full power to originate measures appropriating money from the Federal treasury. This right has at times been denied by certain members of the House, but the House has not itself formally adopted this negative view. In Flint v. Stone Tracy Co., the court said with reference to the corporation tax law which constitutes § 38 of the Tariff Act of August 5, 1909, and which originated in the Senate as an amendment to the law as passed by the House, that the act itself having originated in the lower branch of Congress, and the amendment being germane to the subject-matter of the bill, it was not beyond the power of the Senate to propose it.[6] In practice, however, all the more important appropriation acts originate in the House.

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[4] Art. I, Section 7, Cl. 1.

[5] 167 U. S. 196.

[6] In Hubbard v. Lowe (226 Fed. 135), a Federal District Court held invalid the Cotton Futures Act of 1914 upon the ground that, although a revenue measure, it had not originated in the House of Representatives.

§ 247. Presidential Participation in Lawmaking.

The duties and powers of the President with reference to the enactment of laws are stated in Clause 2 of Section 7 of Article I of the Constitution.

The Federal Executive has never attempted the exercise of, or claimed, the right to veto parts of measures submitted to him by Congress, and to approve the remainder. Because thus bound to accept or reject a bill as a whole, Congress has at times attempted to force the hand of the President by incorporating into a measure, which it is known he will feel almost obligated to sign, provisions which it is believed he would disapprove if submitted to him as independent propositions. At times, however, these so-called "riders" have led to the veto of the entire bill.[7]

Legislative practice, approved by the Supreme Court in Missouri Pacific Ry. Co. v. Kansas [8] has determined that the two-thirds vote of each House required to pass a bill over the President's veto is two-thirds of a quorum and not of the entire membership.

It is clear that the power given to the President with reference to the vetoing of measures of Congress is one that, as a matter of propriety as well as of constitutional right, he may exercise upon any grounds he may deem sufficient; thus the power may be exercised by the President not only to protect himself, or rather his office, against unconstitutional diminution or increase of authority, to check legislation which he deems to be practically inexpedient, or which, as he thinks, does not represent the true will of the American people, or to prevent placing upon the statute books legislation which, in his opinion, is, for any reason, unconstitutional. There have been some who have objected to the exercise of the veto power upon this last ground, as being an assumption of a right to decide a question which should be left to the courts. The author of the present treatise is, however, of the opinion that this position is not a valid one.[9]

§ 248. Signing of Bills During Recess of Congress.

In La Albra Silver Mining Co. v. United States,[10] it was held by the Supreme Court that the President might sign a bill during a recess of Congress.

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[7] For a full discussion of the distinctions between acts, and joint and concurrent resolutions, see a report of the Senate Judiciary Committee, Sen. Rpt., Vol. 1335, 54th Cong., 2d Sess. Joint resolutions, being, in general, legislative in character, require the President's signature.

[8] 248 U. S. 276.

[9] See President Taft's message to Congress of Feb. 28, 1913, with reference to his veto of the Webb-Kenyon Bill.

[10] 175 U. S. 423.

§ 249. Bills May Be Signed by the President After the Adjournment, Final or Intermediate, of Congress.

The Constitution provides that a measure, if not returned to Congress within ten days, Sundays excepted, becomes a law without the President's signature. If, however, Congress adjourns before the expiration of the ten days, the measure does not become a law and this is known as a pocket veto.

Not until 1929, in the case of Okanogan Indians v. United States,[11] was it authoritatively decided that a bill passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President for his approval less than ten days (Sundays excepted) before the adjournment of that session, but neither signed by the President nor returned by him to the House in which it originated, becomes a law. It was held by the court that, by the adjournment the President was prevented from returning the measure within the ten days constitutionally provided, and, therefore, that the measure did not become a law. It was further declared that the ten days allowed by the Constitution are to be regarded as calendar days and not days during which Congress is in legislative session.

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[11] 279 U. S. 655. This case is often cited as "The Pocket Veto Case."

CHAPTER XXXVI

THE FEDERAL POWERS OF TAXATION

§ 250. General Powers of Congress.

In the chapters which are immediately to follow will be taken up seriatim the legislative powers of Congress except in so far as these powers have been considered incidentally elsewhere in this treatise.

In addition to its legislative powers the Houses of Congress have certain other powers, judicial or executive in character. These non-legislative duties are discussed elsewhere in this treatise, and especially in the chapters dealing with the Separation of Powers.

In some cases the powers granted by the Constitution are also made obligations, and, in general, it may be said that where legislation is necessary to make effective the provisions of the Constitution there is laid upon Congress the constitutional obligation to enact this legislation. This obligation, however, is an "imperfect" one in that no legal means exist for compelling its performance or providing for what shall be done in the event of its non-performance. Thus the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Should Congress fail by legislation to establish these inferior judicial tribunals and to clothe them with jurisdiction, there would be no constitutional means of compelling it to do so. Indeed, by failing as well to provide for the number and remuneration of Justices of the Supreme Court, Congress might render impossible the exercise of any Federal judicial power whatever. Once established the Supreme Court, by the immediate effect of constitutional provision, has the original jurisdiction provided for in Section 2 of Article III, but it is unable to exercise any appellate jurisdiction by way of appeals either from the State or lower Federal courts except as Congress has by statute provided.

This is but a single illustration of many that might be given of the manner in which the existence and administration of the Federal Government is absolutely dependent upon the action of Congress, for it may be laid down as a principle which admits of no exceptions that no legal means exist for compelling a legislative body to enact a given piece of legislation, or, indeed, to perform any of its functions.

Though, in many respects, not self-executory, and although the obligations created by its provisions are not enforceable by legal process, the Federal Constitution is, it is to be repeated, in all other respects a law and directly enforceable as such in the courts of the land. It is, as has been already said, a law legislatively enacted by the State legislatures or the State conventions which, *quoad hoc*, acting as a National law-making body, established it and ratified the amendments to it.

The present chapter will be limited to the discussion of the extent of the taxing power of the United States. The constitutional limitation imposed by the requirements of due process will receive general consideration, but will be considered in more detail in the chapters dealing specifically with that important constitutional limitation. The constitutional limitations, express and implied, upon the taxing powers of the States will be discussed in a later chapter especially devoted to that topic, and also in other chapters dealing with such subjects as Interstate and Foreign Commerce, Obligation of Contracts, Equal Protection of the Laws, and, of course, Due Process of Law.

§ 251. The Definition and Levying of Taxes.

Taxes have been defined by an eminent authority to be "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes." [1] The same author in another work observes that they "differ from forced contributions, loans, and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government." [2]

The power to tax is ordinarily spoken of as an incident of sovereignty, or, as a sovereign power. A more exact statement is, however, that, inasmuch as the raising of a certain amount of revenue is essential to the existence and operation of a public governing body, that body has, even in default of express constitutional grant, an implied power to compel those subject to its authority to contribute the financial means necessary for its support.

The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner, is a legislative function.[3]

The determination of the precise amount of the tax which each individual or each piece of property shall pay according to the general rule legislatively laid down, is an administrative act. The determination whether the legislative rule is, constitutionally speaking, a proper one, and whether the administrative officials have properly followed it, as well as observed all the other requirements of law, is, of course, a judicial function. Thus the administrative official must in all cases, in his assessments both as to classes of persons and kinds of property, and as to rates of taxation, be guided by the law. Upon the other hand the legislature, when levying *ad valorem* taxes, has not the power itself, generally speaking, to declare the value of a specific piece, or of specific pieces of property for taxation purposes. Where, however, taxes are laid, not according to values of property, but upon persons, as a capitation tax, or upon occupations, as license fees and tolls, or upon documents, as stamp duties, or upon number or quantities of goods ("specific" taxes), the legislature fixes in each case the amount of the contribution.

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[1] Cooley, *Constitutional Limitations*, 7th ed., p. 678. In this definition the term "property" includes privileges, occupations and enjoyments of the people.

[2] *Taxation*, Chap. I.

[3] Meriwether v. Garrett (102 U. S. 472).

The levying and collection of taxes amounts, of course, to the taking of private property for a public use, but the taxing power is distinct from that of eminent domain. When property is taken in exercise of the latter power the Fifth Amendment requires that the General Government shall make just compensation. When, however, property is taken under the taxing power the persons so taxed may be said to be compensated for their contributions by the general benefits which they receive from the existence and operation of the Government. But this is not to say that the burden of a tax that may be constitutionally laid upon an individual needs to be justified by a showing that he, individually, will receive benefit from the expenditure of the proceeds of the tax, and, much less, that the degree of that burden may be measured by the amount of benefit that the taxpayer may be expected to receive. This requirement and this mode of measurement applies only in the case of what are known as "Special Assessments" the constitutional limitations applying to which will be later considered in connection with the taxing powers of the States.[4]

§ 252. The Extent of the Taxing Power.

The power to tax is, from its very nature, one of the most important powers possessed by the State. Aside from express constitutional limitations, the power places every person, every occupation, and all forms of property subject to such pecuniary burdens as the legislature may see fit to impose, the manner of apportioning and enforcing the collections of the contributions levied being within the discretion of the law-making body which imposes them.

A classic statement of the extent of the taxing power is that of Marshall in McCulloch v. Maryland.[5] Marshall says: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard themselves against its abuse." "The power to tax," Marshall concludes, "involves the power to destroy."

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[4] Southern Pacific Ry. Co. v. Kentucky (222 U. S. 63).

§ 253. Measurement of Taxes.

The courts have firmly fixed the proposition that, for the determination of the amounts of taxes to be assessed upon individual persons, corporations, or pieces of property, any reasonable standard of measurement may be selected, and that the intrinsic character of the tax is not determined by the mode of measurement thus selected. Thus, as will later be seen, the States may not, by an exercise of their powers of taxation, lay a direct burden upon interstate commerce, and yet they may measure the amount of the tax to be paid upon property by its market value, although that value is, to a large extent, due to its employment for the carrying on of interstate commerce. Again, the States and the Federal Government may measure the amount of inheritance or estate taxes to be paid by a decedent's estate by the value of the estate or of the part thereof received by the taxpayer, although the tax, in neither case, is construed to be a tax upon that estate or other property received by the taxpayer. In the one case, it is viewed as an exercise by the States of their right to regulate the succession to, or inheritance of, property; in the other case, it is viewed as an excise tax upon the right to take, or upon the act of taking, possession or ownership of property under the rights of succession or inheritance created by the States in which the property is located, or where the will was executed or probated or administrative proceedings had. And it has been held that taxes on corporate franchises may be measured by reference to the value of property that is not itself taxable.[6]

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[5] 4 Wh. 316, 428, 431. See also Pacific Ins. Co. v. Soule (7 Wall. 433).

[6] See Plummer v. Coler (178 U. S. 115), as to the measurement of estate taxes, and the discussion of cases in which the measurement of corporate franchise taxes is considered.

§ 254. The Use of the Taxing Power, Not for Revenue but for Regulation.

By definition and by primary purpose a tax is a means whereby a public governing power seeks to secure a revenue. It has been generally held, however, that a tax may be levied avowedly and exclusively not for revenue but as a means for regulating a matter, which is within the legislature's power to control. Thus in Veazie Bank v. Fenno [7] the power of Congress to levy a tax as a means of regulating the currency was upheld. So, also, in Edye v. Robertson (Head Money Cases) [8] a law imposing a tax upon owners of vessels bringing immigrants to this country was held to be a regulation of commerce rather than a revenue measure.

In these cases it is seen that the view taken is that though the laws levy a contribution to the State and thus result in a revenue to the State, they are not, correctly speaking, tax laws at all. Not being, in fact, tax laws, they are not subject to the constitutional limitations upon revenue measures as regards uniformity, apportionment, etc.

A proposition different from the one just discussed, is that a legislature, by a law framed as a tax measure, may, in effect, subject to regulation or even to destruction an enterprise over which it has no direct power or control. This point was squarely raised, with reference to the power of the Federal Government in McCray v. United States,[9] decided in 1904.

In this case was questioned the constitutionality of a law of Congress levying a tax of ten cents a pound upon oleomargarine, artificially colored to look like butter. The contention was that this rate was so high as to be surely prohibitive of the manufacture and sale of such oleomargarine, and that, therefore, it was to be presumed that the motive of those enacting the law was not that a revenue should be secured for the Federal Government, but that the manufacture should be prevented; and this, it was argued, rendered the law an unconstitutional effort upon the part of Congress to regulate the manufacture of a commodity within the States. The Supreme Court, however, held that, the law being upon its face a revenue measure, its ultimate effect or the motive of its enactors might not be judicially inquired into. The scope and effect of a law may be inquired into, the court said, to determine whether the act is, in general character, within the legislative power of Congress, but, that determined in the affirmative, the measure may not be invalidated because of consequences that may arise from its enforcement.

The McCray case is, it will be seen, in one respect the opposite of Veazie v. Fenno and the Head Money Cases, in that it holds the law in question to be a tax law and constitutional because it is such; whereas, in the earlier cases, the laws were justified as being, in real character, not revenue measures at all, and, therefore, not subject to the limitations constitutionally imposed upon Congress when enacting revenue laws.[10]

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[7] 8 Wall. 533.

[8] 112 U. S. 580.

[9] 195 U. S. 27.

§ 255. Protective Tariffs.

The constitutionality of a protective tariff, that is, of a system of duties levied on foreign imports so arranged as to furnish incidental protection to home industries, though questioned in earlier years, has passed beyond the range of controversy. Indeed, there never have been decisions of the courts in support of the invalidity of such legislation. If constitutional authority for a protective tariff is needed, it is furnished by the doctrine of McCray v. United States.[11] It is also to be observed that, in the case of protective tariff acts, Congress is able to rely not only on its taxing power, but upon its authority to regulate the foreign trade of the United States.[12]

§ 256. Section 35 of the National Prohibition Act.

In Lipke v. Lederer,[13] it was held that Section 35 of the National Prohibition Act [14] though purporting to provide for a tax, in fact provided for a penalty, and, therefore, that Section 3224 of the Revised Statutes which prohibits injunctions to restrain the collection of internal revenue taxes did not apply.

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[10] For other and later cases upon this subject, see United States v. Jin Fuey Moy (241 U. S. 394); United States v. Doremus (249 U. S. 86); Linder v. United States (268 U. S. 5); United States v. Daugherty (269 U. S. 360); Nigro v. United States (276 U. S. 332), all dealing with the Harrison Anti-Narcotic Act; Bailey v. Drexel Furniture Co. (259 U. S. 20), dealing with the act of Congress in attempted regulation of child labor; and Hill v. Wallace (259 U. S. 44), dealing with the Grain Futures Trading Act of 1921.

[11] 195 U. S. 27.

[12] For a recent emphatic statement of the constitutionality of protective tariffs, see Hampton v. United States (276 U. S. 394).

[13] 259 U. S. 557.

[14] 41 Stat. at L. 85.

CHAPTER XXXVII

LIMITATIONS UPON THE FEDERAL TAXING POWER

The preceding chapter has dealt with the general nature of the power to tax. Incidentally this examination has led to a discussion of the power of the Federal Government through the exercise of its tax-imposing power to regulate, in effect, matters not otherwise within its constitutional control.

The present chapter will deal with the more specific constitutional provisions which determine the extent of, and limitations upon, the Federal Government in the matter of taxation.

During the first years under the Constitution an effort was made by some to have the words of Section 8, Clause 1 of Article I, "to pay the debts and provide for the common defense and general welfare of the United States" construed as, in themselves, constituting a general grant to Congress to take such action as it might see fit to promote or achieve these purposes. It is, however, now generally agreed that these words do not constitute a grant of power, but have for their intent the statement of the purposes for which the Federal Government may levy and collect taxes.

The implied constitutional limitations upon the taxing power of the Federal Government will be dealt with later on, but it is appropriate to state here that Congress and the courts have decisively rejected the proposition that the Federal taxing power may be constitutionally used only for the purpose of carrying into effect the powers specifically granted to Congress by the Constitution.

The limitations expressly laid by the Constitution upon the Federal taxing power are: (1) that duties, imposts, and excises shall be uniform throughout the United States; (2) that direct taxes, other than income taxes, shall be apportioned among the States according to the number of their several inhabitants; (3) that no tax or duty shall be laid upon articles exported from any State; (4) that preference shall not be given by any revenue regulation to the ports of one State over those of another State; and (5) that ships bound to, or from, one State, shall not be required to enter, clear or pay duties in another State. These express limitations will be considered *seriatim* and in the order stated.

The implied limitations upon the Federal taxing power are those which arise from the requirements of due process of law and from the essential nature of the American constitutional system which restrains the United

States from directly interfering with the exercise by the States of their constitutional powers.

The relation of due process of law to the taxing power, whether of the general Government or of the States, is considered in the chapters dealing with Due Process of Law.

The restraint upon the Federal taxing power arising from the essential nature of the American constitutional system have already been dealt with.

§ 257. Uniformity in Taxation.

Granting the right of the legislature to classify persons and property for purposes of taxation, the requirements of due process of law and of the additional provision found in the Federal Constitution and in almost all if not in all of the State Constitutions that all laws shall be uniform, make it necessary that the assessment of all persons and property within the class or district selected for taxation shall be according to a uniform rule. In practice, however, this rule is subject to qualifications which are more appropriate for discussion in a treatise on taxation than in one on constitutional law. It will, therefore, not be further considered here. However, certain aspects of the subject will be later discussed in connection with the matter of special assessments.

§ 258. What Constitutes Uniformity throughout the United States.

In the Head Money Cases,[1] the court said: "The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. . . . The tax is uniform when it operates with the same force and effect in every place where the subject is to be found."

The principles of uniformity and of reasonable classification for purposes of taxation have been especially examined by the courts with reference to inheritance tax laws, and will later be treated under that head.[2]

In Billings v. United States [3] it was held that the Uniformity Clause of the Constitution was not violated by an excise, based upon gross tonnage, levied upon the use of foreign-built pleasure yachts owned by the citizens of the United States, because a like tax was not imposed upon the use of domestic yachts under similar circumstances.

In Flint v. Stone Tracy Co.[4] it was held that a Federal tax imposed upon the carrying on or doing business in a corporate or *quasi*-corporate capacity, and exempting therefrom businesses carried on by partnerships or private individuals, was not open to objection as lacking in constitutional uniformity. The advantages that inhere in the corporate form of doing business, it was held, furnished adequate ground for selecting out, as a class for taxation, the doing of business in such form.

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[1] 112 U. S. 580.

[2] See *post*, Chapter LXXXVII.

[3] 232 U. S. 261.

[4] 220 U. S. 107.

In Florida v. Mellon [5] the claim that there was a lack of constitutional uniformity in the provision of the Revenue Act of 1926 [6] providing for a refund to payers of the Federal inheritance tax of amounts paid by them (up to eighty per cent of the Federal tax) under State inheritance tax laws, was dismissed with the statement that "the contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several States nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax. All that the Constitution requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

§ 259. Direct Taxes.

The Constitution provides that capitation and other direct taxes levied by Congress shall be apportioned among the States in proportion to their respective populations. In a number of instances the constitutionality of Federal taxes not thus apportioned has been questioned upon the ground that they were, within the constitutional meaning of the word, direct taxes. The decision of the Supreme Court in each of these cases in which this point has been raised has supplied an authoritative determination only as to the direct or indirect character of the particular taxes in question.

In 1798 in Hylton v. United States [7] it was held that a tax on carriages was not a direct tax.

In Pacific Insurance Co. v. Soule [8] a tax on receipts of insurance companies was held to be not a direct tax, the *dicta* in Hylton v. United States being relied upon as authority.

In Veazie Bank v. Fenno [9] a tax on the circulating notes of State banks was held to be an indirect tax.

In Scholey v. Rew [10] a tax on succession to real estate was held indirect, the tax being declared to be one not upon the land, but upon the right of succession.

In Springer v. United States [11] the income taxes provided for by the law of 1862 were held not to be direct taxes. After reviewing earlier cases and citing the opinions of leading commentators, the court concluded:

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[5] 273 U. S. 12, 17.

[6] 44 Stat. at L. 9.

[7] 3 Dall. 171.

[8] 7 Wall. 433.

[9] 8 Wall. 533.

[10] 23 Wall. 331.

[11] 102 U. S. 586.

"Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

§ 260. Income Tax Case—Pollock v. Farmers' L. & T. Co.

The foregoing line of cases, concluding with the emphatic assertion of a unanimous court in Springer v. United States, justly gave rise to the general opinion that the only taxes to be deemed direct taxes within the constitutional meaning of the term were capitation taxes and taxes on real estate. However, in the so-called Income Tax case—Pollock v. Farmers' Loan & Trust Co.[12]—decided in 1895, this doctrine was overthrown, the court, upon the first hearing, holding that taxes on the rents or income of real estate are direct taxes; and, upon a rehearing, holding that taxes on personal property or on the income derived from personal property are also direct.

Upon the first hearing the crucial point was, of course, whether a tax upon the income derived from real estate was distinguishable from a tax on the real estate itself. This being decided in the negative, it necessarily followed that, inasmuch as a tax on the real estate is admittedly a direct tax, a tax on the income derived therefrom would be direct.

A rehearing of the case having been allowed the court broadened still further the scope of the term "direct taxes," making it include taxes on personal property and upon the income therefrom. From this doctrine four justices dissented.

In Nicol v. Ames [13] the scope of the doctrine laid down in the Income Tax case was clearly stated. In this case it was argued that a duty levied by the War Revenue Act of 1898 upon sales or agreements of sale of products or merchandise at exchanges or boards of trade was a direct tax and as such unconstitutional because not properly apportioned. The court, however, held that the tax was in the nature of a duty or excise tax for the privilege of doing business at such places and not a tax on the products or merchandise sold, and, therefore, not a direct tax.

In Patton v. Brady [14] a tax upon tobacco, however prepared, manufactured and sold, for consumption or sale, was held not a direct tax but an excise tax,—"not a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use."

In Spreckels Sugar Refining Co. v. McClain [15] the special excise tax imposed on sugar refining by the act of 1898, and measured by the gross annual receipts in excess of a named sum, was held to be not a direct tax. "Clearly," the court said, "the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

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[12] 157 U. S. 429; and 158 U. S. 601.

[13] 173 U. S. 509.

[14] 184 U. S. 608.

[15] 192 U. S. 397.

The constitutional definition of a direct tax was again raised in Knowlton v. Moore [16] with reference to the constitutionality of the inheritance taxes levied by the War Revenue Act of 1898. The court applied the well established doctrine that the taxes in question were not upon the property inherited but upon the right to inherit, and, therefore, not being taxes upon property but upon a right, were in the nature of an excise tax, and as such indirect.

In Synder v. Bettman [17] it was held that a succession tax, such as that levied by the act of 1918, could be levied upon bequests to a municipality of a State for public purposes, since the tax, being collected from the property while in the hands of the executor, could not be regarded as a tax upon the municipality, although it might operate incidentally to reduce, by the amount of the tax, the amount of the bequest.

In Flint v. Stone Tracy Co.[18] the court unanimously held that the tax laid upon corporations by Section 38 of the Tariff Law of 1909, was an excise levied "upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described." As such it was held to be an indirect tax which did not need to be apportioned among the States according to their respective populations. The income of the concerns taxed was declared to be but the measure of the tax and not the subject-matter itself of the tax.

In New York Trust Co. v. Eisner [19] it was again declared that the estate tax levied by the law of 1916 was an excise tax and, therefore, did not need to be apportioned among the States. As to the claim that the tax was an interference with the right of the States to regulate the descent and distribution of property, the court said that the unsoundness of this contention had been settled by Knowlton v. Moore. That case, it is true, dealt with a legacy, rather than an estate tax, but the principle was the same.

In Eisner v. MacComber,[20] the purpose and effect of the Sixteenth Amendment were examined by the court in connection with the contention made that, under the Amendment, Congress did not have the power, under an unapportioned income tax law, to treat as income of the stockholder, stock dividends lawfully made and in good faith against accumulated profits. This contention the court upheld.

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[16] 178 U. S. 41. See also Snyder v. Bettman (190 U. S. 249).

[17] 190 U. S. 249.

[18] 220 U. S. 107.

[19] 256 U. S. 345.

[20] 252 U. S. 189.

In Miles v. Safe Deposit and Trust Co.[21] it was held that "rights" accruing to stockholders to subscribe for new stock in the corporation at a price less than its intrinsic value, were analogous to stock dividends, and, therefore, could not be assessed as income. The court, however, pointed out that the proceeds from the sale of such "rights" were properly to be deemed income, just as, in Eisner v. MacComber it had been declared that gains through the sale of stock obtained as dividends were to be treated as income.

In Bromley v. McCaughn[22] it was held that any tax imposed upon a particular use of property or on the exercise of a single power over property incidental to its ownership, is an excise tax, and, therefore, that a Federal tax upon transfers by gift *inter vivos* not in contemplation of death, is an excise tax which does not need to be apportioned among the States.

§ 261. Direct Taxes and the Sixteenth Amendment.

By the Sixteenth Amendment, adopted in 1913, it is declared that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

This addition to its power was given to Congress in order to meet the objection raised to Federal income taxes that, being direct in character, they might be constitutionally levied only when apportioned among the States.

In exercise of the power thus granted, Congress enacted the Income Tax Law of October 3, 1913,[23] and, since that time, this tax has become the most important of the sources of Federal revenue. Much litigation has resulted as to what may properly be assessed as "income," and the cases bearing upon this point will be discussed in the sections dealing with Federal income taxes.

The words of the Amendment making taxable incomes "from whatever source derived," has raised the question whether the Federal Government has been given the power to tax the salaries of State officials, and income derived from bonds or other securities issued by the States. This question also will be discussed in the sections dealing with Federal income taxes.

In Brushaber v. Union Pacific R. R. Co.[24] the court disposed of the contention that had been made that, under the Sixteenth Amendment, Congress might levy income taxes that were neither apportioned nor uniform throughout the United States; that, in other words, income taxes remain direct taxes, and, therefore, are not subject to the requirement of uniformity which is imposed upon duties, imposts and excises, and also, as declared by the Amendment, do not need to be apportioned. This contention, the court said "is wholly without foundation" since the purpose of the Amendment is simply to avoid the rule applied in the Pollock case by which alone such taxes were removed from the great class of excises, duties and imposts subject to uniformity and placed under the class of direct taxes.

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[21] 259 U. S. 247.

[22] 280 U. S. 124.

[23] 38 Stat. at L. 114.

[24] 240 U. S. 1.

§ 262. Salaries of Federal Judges and the Sixteenth Amendment.

In Evans v. Gore[25] the court held that, despite the broad language of the Amendment as to incomes from whatever source derived, the salaries of Federal judges might not be taxed, since Article III, Section 1, provides that the compensation of such judges shall not be diminished during their continuance in office.

Here again the court held the Amendment strictly to the wording of the rule laid down in Pollock v. Farmers' Loan & Trust Co.[26] and, therefore, refused to give it an application that would, in effect, nullify a specific prohibition contained elsewhere in the Constitution.[27]

In Miles v. Graham[28] the court held that even as to judges appointed after the Revenue Act of 1918 took effect, an income tax could not be levied.

§ 263. Export Duties.

Among the express limitations upon the powers of Congress, enumerated by the Constitution is that which provides that "no tax or duty shall be laid on articles exported from any State." [29] In another clause substantially the same prohibition is laid upon the States, it being declared that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." [30]

The term "exports" has been judicially limited to goods exported to foreign countries. In the earlier cases of Brown v. Maryland[31] and Almy

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[25] 253 U. S. 242.

[26] 158 U. S. 601.

[27] The court pointed out that this construction of the Amendment, first stated in Brushaber v. Union Pacific R. R. Co. (240 U. S. 1), had been reaffirmed in Stanton v. Baltic Mining Co. (240 U. S. 103); Peck v. Lowe (247 U. S. 165); and Eisner v. MacComber (252 U. S. 189). Justices Holmes and Brandeis dissented.

[28] 268 U. S. 501.

[29] Art... I, Sec. 9, Cl. 5.

[30] "Except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress" (Art. I, Sec. 10, Cl. 2).

[31] 12 Wh. 419.

v. California[32] it was taken for granted by the court that the term applied also to goods carried from one State to another State of the Union, but in Woodruff v. Parham[32a] these *dicta* were overruled and the position taken, which has not since been disturbed, that the prohibition has reference only to exportations to countries foreign to the United States.

To come within the definition of an export tax, it has been held that the tax must be one levied upon the right to export, or upon goods because of the fact that they are being exported or are intended to be exported. The fact that certain goods are intended for export does not, however, exempt them from an ordinary property tax, for, as said, the tax is one on exports only when its incidence or amount is determined by the fact that the goods are intended for export. This is the doctrine laid down in Coe v. Errol[33] with reference to taxation by the States and in Turpin v. Burgess[34] with reference to Federal taxation.

In Pace v. Burgess[35] was questioned the validity of a Federal law requiring stamps to be affixed to packages of manufactured tobacco intended for exportation. The court, however, held the requirement to be a proper one to prevent fraud and not to amount to a tax on exports.

In Fairbank v. United States,[36] however, a stamp tax imposed on foreign bills of lading by the act of 1898 was held to be, in substance and effect, a tax on the articles included in the bills of lading, and, therefore, a tax on exports, and as such unconstitutional.

In Cornell v. Coyne[37] was sustained the imposition of the same manufacturing tax on an article manufactured for export, and in fact exported, as upon other similar articles not intended for export, the court saying that such a tax is not on the articles exported "but is only a tax or duty on the manufacturing of articles in order to prepare them for export."

In Thompson v. United States[38] it was held that a tax on distilled spirits intended for exportation was not a tax on exports.

In United States v. Hvoslef,[39] it was held that a stamp tax upon charter parties exclusively for the carriage of goods from the United States to foreign States was a tax on the goods exported, and, therefore, unconstitutionally levied.

In Thames and Mersey Marine Insurance Co. v. United States,[40] it was held that stamp taxes upon policies of marine insurance also were within the prohibition as to export taxes.

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[32] 24 How. 169.

[32a] 8 Wall. 123.

[33] 116 U. S. 517.

[34] 117 U. S. 504.

[35] 92 U. S. 372.

[36] 181 U. S. 283.

[37] 192 U. S. 418.

[38] 142 U. S. 471.

[39] 237 U. S. 1.

[40] 237 U. S. 19.

In Peck & Co. v. Lowe [41] it was held that a general income tax levied upon the entire annual incomes of domestic corporations was not invalid as to income derived from export trade. The tax in question, the court said, " is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. . . . At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins."

In National Paper and Type Co. v. Bowers [42] it was held that an income tax on the profits derived by domestic corporations from the business of exporting goods from the United States was not a tax on exports from a State.[43]

In Spalding & Bros. v. Edwards [44] it was held that the fact that a tax was levied by a general law touching all sales of a class and was not aimed directly at exports, did not exempt the tax from the constitutional prohibition as to export taxes, and that, in the instant case, the tax could not constitutionally be levied upon the sales of goods by a manufacturer to a commission merchant for export, and where title passed upon the delivery of the goods by the manufacturer to the carrier. In this case, said the court, the export had begun, and the constitutional prohibition therefore applied.

§ 264. Preferences to Ports and Ship Dues.

The prohibition laid upon Congress as to the giving of preferences by regulations of commerce or of revenue, to the ports of one State over those of another State has given rise to few occasions for judicial action, and, in those cases, the question has arisen with reference to regulations of commerce rather than to the imposition of taxes. As regards taxation, this limitation has received no exposition at the hands of the courts. And the same is true as to the constitutional provision that vessels bound to, or from, one State, may not be compelled to enter, clear, or pay duties in the ports of another State.[45]

In Pennsylvania v. Wheeling and Belmont Bridge Co.[46] which is perhaps the chief case construing the preference clause, the court said: "It is a mistake to assume that Congress is forbidden to give a preference to a port in one State over a port in another. Such preference is given in every instance where it makes a port in one State a port of entry, and refuses to make another port in another State a port of entry. . . . The truth seems to be that what is forbidden is not discrimination between individual ports within the same or different States, but discrimination between States; and, if so, in order to bring this case within the prohibition, it is necessary to show not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania." [47]

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[41] 247 U. S. 165, 174, 175.

[42] 266 U. S. 373.

[43] Upon authority of Peck v. Lowe (247 U. S. 165). The fact that foreign corporations engaged in similar business were not subject to the tax was held immaterial.

[44] 262 U. S. 66.

[45] Congress may permit the States to adopt reasonable and non-discriminatory pilotage regulations. Thompson v. Darden (198 U. S. 310).

[46] 18 How. 421.

§ 265. Borrowing Power of the United States: Legal Tender.

The Federal Government is given power "to borrow money on the credit of the United States." [48]

The power thus given is free from limitations. In the draft of the Constitution reported by the Committee on Detail to the Constitutional Convention, the draft read, "To borrow money and emit bills on the credit of the United States." The express authorization to emit bills of credit was stricken out by the Convention, but, apparently, not with the intention of thereby depriving the United States of the power, but upon the ground that the power would be included in the general authority to borrow money. That this is so, has not been questioned by the courts. There has, however, been serious controversy as to the power of the United States to give a legal tender character to these bills when issued.

The debates in the Constitutional Convention, and various provisions of the Constitution, would seemed to indicate an intention upon the part of the framers of the Constitution that a legal tender character might be given by Congress only to the metallic money coined by the United States, and the Supreme Court in Hepburn v. Griswold [49] so held as regards the payment of debts between private parties created before the enactment of the law. In Knox v. Lee,[50] however, four justices dissenting, this doctrine was overthrown, and the issuance of legal tender notes authorized as a legitimate war power. And finally, in the Legal Tender cases, Juilliard v. Greenman,[51] the authority in question was conceded to exist as implied in the general power to borrow money, whether in times of war or peace.

As regards the contention that the effect of applying the legal tender law to prior contracted debts is to deprive the creditor of property without due process of law, in violation of the Fifth Amendment, the court in Knox v. Lee said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that directly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war declared?"

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[47] See also S. Carolina v. Georgia (93 U. S. 4); Louisville & N. Ry. Co. v. Interstate Commerce Com. (184 Fed. 118); and Armour Packing Co. v. United States (209 U. S. 56); Alaska v. Troy (258 U. S. 101, 109).

[48] Art. I, Sec. 8, Cl. 2.

[49] 8 Wall. 603.

[50] 12 Wall. 457.

[51] 110 U. S. 421.

CHAPTER XXXVIII

INTERSTATE AND FOREIGN COMMERCE

§ 266. Developing Importance of the Commerce Clause.

By Clause 3 of Section 8 of Article I of the Constitution, known as the Commerce Clause, Congress is given the power to "regulate commerce with foreign nations and among the several States, and with the Indian Tribes."

The full importance of the grant of authority contained in this clause did not appear for many years after the adoption of the Constitution. Not until 1824 by the decision of the Supreme Court in Gibbons v. Ogden [1] was a clear indication given of the extent of the power granted, and not until the Constitution was nearly a hundred years old did Congress begin the exercise of the authority granted it to regulate, affirmatively, commerce between the States.

§ 267. Purpose of the Commerce Clause.

There can be but little question that the chief and possibly the entire purpose of the Commerce Clause was, as far as interstate commerce was concerned, to empower the Federal authorities to prevent the States from interfering with the freedom of commercial intercourse between themselves or with foreign nations; but, as the court observed in Addyston Pipe & Steel Co. v. United States,[2] "The reasons which may have caused the framers of the Constitution to repose power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself." This is to say, the power being granted without qualification, except as to preference of the ports of one State over those of another, extrinsic evidence may not be resorted to in order to give to the grant a meaning narrower than that which its words convey.

§ 268. Constitutional Source of the Right to Engage in Interstate and Foreign Commerce.

It is of fundamental importance to determine whether the right of the individual or of a corporation to engage in interstate commerce exists independently of the Federal Constitution and is merely subject to regulation by Congress, or whether the right is one wholly of Federal creation; for, if it be determined that the latter is the case, Congress can be argued to have a right of exclusion from such commerce that could be more drastically and even arbitrarily used than if the former premise were accepted.

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[1] 9 Wh. 1.

[2] 175 U. S. 211. In the Passenger cases, 7 How. 283, Justice Woodbury said: "It was a difference between the States as to imposts or duties on imports and tonnage which embarrassed their intercourse with each other and with foreign nations, and which mainly led to the Constitution and not the mere regulation of commerce."

An examination of the judicial *dicta* upon this point shows that, upon numerous occasions, the right has been declared to be distinctly a Federal right, but not, it is believed, in the sense that it is a right dependent for its very existence upon Federal law, but only as one guaranteed by the Constitution against State impairment or regulation. In Gibbons v. Ogden [3] Marshall's language was precisely to this effect. He said: "In pursuing this inquiry at the bar it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right and gave to Congress the power to regulate it." This was quoted and approved by Chief Justice Fuller in a dissenting opinion in Dooley v. United States.[4] So, also, as said by Justice Clifford in his dissenting opinion in Gilman v. Philadelphia: [5] "[The] right of intercourse between State and State was a common law privilege and as such was fully recognized and respected before the Constitution was formed. Those who framed the instrument found it an existing right, and regarding the right as one of high national interest, they gave to Congress the power to regulate it."

In Vance v. Vandercook [6] the court declared that "the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of State law," and, in Crutcher v. Kentucky,[7] the court said: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

These and similar declarations of the Supreme Court, it is seen, go no further than to exclude foreign and interstate commerce from State control. They do not go to the extent of holding that the existence of the right is dependent upon congressional enactment;—indeed, they practically negative this by asserting that the right is one recognized and protected by the Constitution.

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[3] 9 Wh. 1.

[4] 183 U. S. 151, 211.

[5] 3 Wall. 713.

[6] 170 U. S. 438.

[7] 141 U. S. 47.

In the Employers' Liability case [8] the proposition was urged that a corporation, by engaging in interstate commerce, subjects itself to possible Federal regulations as to all of its activities, those which do not have a relation to interstate commerce as well as to those which have. This doctrine the court repudiated.

§ 269. Federal Control of Foreign Commerce Wider than Its Control of Interstate Commerce.[9]

The same clause which gives to Congress the power to regulate commerce among the States extends the power to commerce with foreign nations. It has been declared that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." [10] This is true, and yet the control which the United States may exercise over foreign commerce is broader than that which it may exercise over interstate commerce for the reason that it is able to draw additional extent from constitutional sources other than the Commerce Clause. Thus, especially, from the exclusive and plenary authority over foreign relations, granted to it, the Federal Government is able to control the admission of aliens, to provide for their deportation, to grant special commercial privileges by treaty, and to lay a total or partial embargo upon foreign commerce.[11]

§ 270. Commerce with the Territories and with the District of Columbia.

The Commerce Clause contains no reference to trade between the States and the Territories or the District of Columbia, or the Territories *inter se*. In general, however, the courts have treated the District of Columbia and the Territories as "States" within the meaning of the Clause.[12]

Congress having exclusive jurisdiction within and over the District and the Territories, there of course cannot arise, as to them, the objection that Federal regulations extend to matters that are of domestic concern.

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[8] Howard v. Ill. Cen. Ry. (207 U. S. 463).

[9] For further discussion of foreign as distinguished from interstate commerce, see Section 362.

[10] Brown v. Houston (114 U. S. 622).

[11] See Groves v. Slaughter (15 Pet. 449), and Buttfield v. Stranahan (192 U. S. 470).

[12] Hanley v. Kansas City S. Ry. Co. (187 U. S. 617); Stoutenburgh v. Hennick (129 U. S. 141). These cases do not, however, squarely decide this point. *Cf. Michigan Law Review*, II, 468.

§ 271. Commerce with Indians.

So long as the Indians form distinct communities occupying clearly defined territories, even though those territories be within the borders of the States, intercourse with them is a matter subject to Federal regulation,[13] and this Federal power of regulation extends to the prohibition of sales to Indians within a State and beyond the borders of the Indian Reservation.[14] The Federal control of commerce with the Indians, given by the Commerce Clause, is thus seen to be supplemented by the general jurisdiction of the National Government over Indians as wards of the Nation.[15]

§ 272. Postal Power and Commerce Power of Congress Distinguished as to Their Essential Characters.

The cases in which it has been held that the Federal Government has a full discretionary power to exclude articles from the mails cannot be used to support, by analogy, a similar power over interstate commerce. For, by the Constitution, Congress is given the exclusive power to establish post-offices or post-roads. The maintenance of a postal service is thus a subject over which the States have no authority whatever. Interstate commerce is, however, a matter which is not established by the Federal Government. Its regulation, and not its creation, by the Federal Government, is provided for by the Constitution. The distinction between the powers of the United States with reference to interstate commerce and those arising out of its power to establish post-offices and post-roads is recognized in the leading case of *In re* Jackson[16] in which the court said: "We do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes of articles which legitimately constitute mail matter in the sense in which those laws were used when the Constitution was adopted—consisting of letters and of newspapers and pamphlets when not sent as merchandise; but further than this, its power of prohibition cannot extend."

§ 273. Commerce Defined.

In the sections which immediately follow the attempt will be made to state the broader criteria which the courts have accepted for determining what is commerce, and when a person may be said to be engaged in it. The application of these criteria to special conditions will receive illustration when those conditions are specifically examined. In particular it will be found that the application to specific cases of the Federal laws fixing the liability of public carriers in cases of accidents to their employees while engaged in foreign and interstate commerce has made it necessary to examine whether such commerce has been, under the given circumstances, involved.

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[13] United States v. Kagama (118 U. S. 375); United States v. Holliday (3 Wall. 407).

[14] United States v. Holliday (3 Wall. 407).

[15] See Chapter XX for a more detailed treatment of this subject.

[16] 96 U. S. 727.

The extent to which, in the regulation of rates for interstate transportation, Congress is constitutionally empowered to control intrastate rates, involves, of course, a consideration of the question as to the point at which interstate commerce ceases and intrastate commerce begins. It will thus be found that the cases in which this line of division is drawn throw considerable light upon the definition of interstate commerce. The same is true as to the other conflicts that have arisen between Federal and State authority with reference to commerce, as, for example, the questions as to when State taxing, police, or other laws have unduly interfered with interstate commerce. These are topics, however, which can be better treated under their respective heads than under the general head of the Definition of Commerce.

§ 274. Transportation Essential.

Since Gibbons v. Ogden[17] it has been established that transportation is an essential element of interstate or foreign commerce, that is, the carrying of persons or things, or the transmitting of intangible things such as telegraph or telephone or wireless messages, whether by land, by water, or through the air.[18] This means that interstate or foreign transportation must itself be involved, or that the transactions, in order to be held to be subject to congressional regulation under the Commerce Clause, must be directly and integrally related to such transportation.

The Supreme Court, it is to be observed, has been liberal in its findings as to the fact of transportation being involved in a transaction. Thus, for example, it held that transportation was present when sheep were driven across State lines.[19]

§ 275. Commerce and Intercourse Distinguished. Is Trade for Profit Essential to Commerce?

A fair interpretation of the term "commerce" as used in the clause of the Constitution giving to Congress the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes," would seem to require that, in order to bring a transaction or instrumentality or commodity within the regulatory power thus given there would have to be involved at some point a commercial element, that is, one of trade or exchange of goods or of services made or rendered for profit. The Supreme Court, however, seems to have committed itself to the proposition that this is not so, with the result that the crossing of persons from one State to another State in their own vehicles, as for example, motor cars, or in the privately owned vehicles of others, for use of which no charge is made, or the sending or carrying of goods across State lines for any purposes whatever, whether commercial or not, constitutes interstate commerce within the constitutional meaning of the term. As thus defined by the Supreme Court, commerce has come to mean intercourse.

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[17] 9 Wh. 1.

[18] That transportation by water is included was one of the important points decided in Gibbons v. Ogden. "The word [commerce], then," said Chief Justice Marshall, "comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.' "

[19] Kelley v. Rhoads (188 U. S. 1).

The tendency to give to commerce this broad constitutional meaning was shown in the case of Gibbons v. Ogden,[20] in which Chief Justice Marshall gave for the first time a careful examination of the extent of the Federal power under the commerce power, and the corresponding limitations upon the authority of the States to deal with the subject. In that case, which will later be more fully examined, Marshall said: "The subject to be regulated is commerce; and . . . it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is intercourse."

In this case the question presented was as to the power of a State to grant to steam vessels the right of navigating the waters within its borders to the exclusion of vessels licensed under Federal law, and Marshall was concerned to bring navigation within the scope of commerce, and, therefore, as to interstate navigation, within the regulatory power of Congress. The case is, therefore, authority only as to this point, and the assertion, in general terms, that commerce is intercourse, is *obiter*. And, even thus, Marshall did not say that all intercourse, whether or not embracing a traffic or transportation for gain, is commerce. However, the identification of the two terms thus started upon its course has remained, although, as will be seen, there have been comparatively few cases in which the Supreme Court has found it necessary to define as interstate commerce transactions between the States or across State lines which, though constituting intercourse, have lacked a commercial element in the economic sense of the term.

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[20] 9 Wh. 1.

In the opinion of the court in Pennsylvania v. Wheeling and Belmont Bridge Co.[21] again occurs the statement that the commercial power of Congress includes the right to regulate intercourse.

In Mobile v. Kimball,[22] it is held that the transportation of persons across State lines or between the United States and foreign countries is commerce without regard to the purpose for which such persons obtain transportation, the court saying: "Commerce with foreign countries and among the several States strictly considered consists in intercourse and traffic, including in these terms navigation and the transit of persons and property, as well as the purchase, sale, and exchange of commodities." [23]

In Covington Bridge Co. v. Kentucky [24] it was held that a State had not the power, without the consent of Congress, to impose tolls upon persons crossing a bridge connecting one State with another State, the court saying "the thousands of persons who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

Despite the generality of the language used in these cases, it will be observed that in none of them was the commercial element wholly lacking, for, although the persons concerned were not themselves crossing State lines for purposes of trade or other business, they were being transported by carriers which were engaged in such transportation for purpose of financial gain; and, in the Covington case, the bridge was itself maintained and operated by its owners for purposes of gain.

However, in later cases we have instances in which even this distinctively commercial element was lacking. In these cases the court, instead of employing the term or idea of "intercourse" emphasized the element of "transportation," and, in effect, held that whenever a commodity is carried across State lines, whatever may be the purpose of the carrying, or the means, public or private, by which it is carried, interstate commerce results.[25]

§ 276. Commerce Embraces Water Navigation.

As has been already seen, commerce includes navigation of the water, and, where this navigation is for the transportation of persons or goods to or from foreign countries or among the States, it is brought within the authority given to the Federal Government by the Commerce Clause. This was established once for all in Gibbons v. Ogden.[26]

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[21] 18 How. 421.

[22] 102 U. S. 691.

[23] See also to the same effect, Lord v. Steamship Co. (102 U. S. 541). In the opinion in Hannibal & St. J. Ry. Co. v. Husen (95 U. S. 465) occurs the statement: "Transportation is essential to commerce, or rather is commerce itself."

[24] 154 U. S. 204.

[25] See United States v. Simpson (252 U. S. 465); Wilson v. United States (232 U. S. 563).

It is to be remembered that, during the early years under the Constitution, the admiralty jurisdiction of the United States was held to give it authority to regulate navigation only upon tidal waters and, therefore, it was then important to bring interstate navigation under the commercial power of Congress. However, the admiralty jurisdiction of the United States has since been held to extend over all waters, whether tidal or not, and whether extending across or between State boundaries or not. It is sufficient if they are used or are susceptible of being used as highways, or as links of highways over which trade and travel may be conducted between States or with foreign countries in order to bring them under the Federal admiralty jurisdiction. In a geographical sense, therefore, the admiralty jurisdiction of the United States has thus become broader than its commercial power, and, therefore, there is now no necessity of resorting to the Commerce Clause in search of authority for the regulation by Congress of matters of navigation. However, the fact that, in very many cases, the constitutional authority of Congress may be based upon either of these grants of power has, in a number of instances, caused the courts to leave uncertain in their opinions which of these sources of constitutional power they have relied upon in support of their affirmations of Federal authority as applied to the facts of the cases before them.[27]

§ 277. Transportation of Persons Is Commerce.

That the transportation of persons is as much commerce as is the transportation of commodities has already appeared in preceding sections. There has been no doubt of this since it was declared in the early case of New York v. Miln.[28]

Whether or not the mere walking of persons across State lines, and for purposes unconnected with any matters of trade or business for pecuniary profit, that is, in which there is present no element either of transportation or of commerce in the economic or financial sense of the word, the courts have had no occasion to say, but it would seem certain that the crossing of State lines under such circumstances cannot properly be described as interstate commerce, for there is absent the essential element of transportation. Such a crossing by persons cannot be prohibited or in any way restrained by the States, except for strictly police purposes, but this is not because of their lack of power to regulate interstate commerce, but for other reasons.[29]

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[26] 9 Wh. 1.

At the time the Constitution was adopted almost all the commerce then being carried on among the States was by water, and there is considerable ground for believing that those who framed and adopted the Commerce Clause had exclusively in mind commerce by water.

[27] See *post*, Chapter LXV for discussion of Admiralty Jurisdiction of the United States.

[28] 11 Pet. 102.

§ 278. The Instrumentalities of Commerce.

"The powers . . . granted by [the Commerce Clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth." [30]

The doctrine thus laid down in the Pensacola case has never been questioned. Telephonic messages are, of course, covered by it. No cases involving the transmission of wireless messages have been decided by the Supreme Court, but without doubt they will be treated as commerce, and the same would be true of messages and persons carried by aëroplanes and other apparatus for the navigation of the air.

Southern R. Co. v. United States [31] is authority for the proposition that cars, or, impliedly, other instrumentalities employed by railroads engaged in interstate commerce, are subject to regulation, as regards their safety equipment, by Congress, under its power to regulate interstate commerce, even though these instrumentalities are, in fact, employed in intrastate and not in interstate transportation.

§ 279. Electric Railways.

That electric railways transporting passengers or goods across State lines constitute interstate commerce, and are embraced within various of the acts of Congress for the regulation of such commerce was decided in United States v. Village of Hubbard, Ohio.[32] Previously to this the Interstate Commerce Commission had repeatedly applied Federal laws to such roads.

§ 280. Bus Lines—Use of State Roads.

That motor bus or other kinds of bus lines transporting persons or goods across State lines are engaged in interstate commerce, and are, as such, subject to Federal regulation, has not been questioned. Difficult questions have, however, arisen with reference to the rights of the States to regulate the use by such busses of State constructed or owned roads. These questions are considered in another place.[33]

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[29] See *ante*, § 125.

[30] Pensacola Tel. Co. v. W. U. Tel. Co. (96 U. S. 1).

[31] 222 U. S. 20.

[32] 266 U. S. 474.

§ 281. Gas and Oil Pipe Lines.

By the present Interstate Commerce Act, Congress has not subjected to regulation the interstate transmission in pipes of natural or artificial gas, but that such transmission and the instrumentalities connected therewith are subject to regulation by Congress under the Commerce Clause, as well as the oil pipe lines which have been brought under Federal regulation, is well established.[34] This has been determined in cases in which has been examined the constitutional right of the States, by taxation or otherwise, to interfere with the interstate transmission or transportation of these commodities.

In Public Utilities Commission v. Landon [35] the court held that the retail sale of natural gas by local companies which obtained their gas through pipes from other States was not interstate commerce, although the local pipes were permanently connected with the interstate pipes. But, as the court pointed out in Pennsylvania Gas Co. v. Public Service Commission,[36] this determination had no bearing upon the interstate commercial character of the transmission of the gas through the interstate pipes. The case was authority only for the doctrine that the sale of the gas by the local companies was separable from its interstate transmission, and, as such, was to be treated as intrastate in character. In the instant case the gas was transmitted directly from the source of supply in the State of Pennsylvania to the consumers in the State of New York. "This transmission," said the court, "is continuous and single and is, in our opinion, a transmission in interstate commerce, and therefore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us."

In this case the court held that, until Congress asserted its superior power, a State might regulate the rates to be charged by local companies supplying gas to local consumers reached by pipes using the streets of a municipality, even though the gas was brought in pipes from another State.

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[33] See *post*, § 380.

[34] As to natural gas, see West v. Kansas Natural Gas Co. (221 U. S. 229); Haskell v. Kansas Natural Gas Co. (224 U. S. 217); Western Union Tel. Co. v. Foster (247 U. S. 105); Public Utilities Commission v. Landon (249 U. S. 236); Pennsylvania Gas Co. v. Public Service Commission (252 U. S. 23); Pennsylvania v. West Virginia (262 U. S. 623); Missouri v. Kansas Natural Gas Co. (265 U. S. 298); United Fuel Gas Co. v. Hallanan (257 U. S. 277).

[35] 249 U. S. 236.

[36] 252 U. S. 23.

In Pennsylvania v. West Virginia [37] however, it was held that gas, being a lawful article of commerce, a State could not require that interstate pipe lines should subordinate their interstate to their intrastate or domestic business, and, therefore, that a State law was unconstitutional which sought, with reference to national gas reduced to possession within the State, to prefer consumers within the State to those without the State, the supply of the gas in question not being adequate for both classes of consumers.

§ 282. Commodities of Commerce.

The commodities transported may be tangible and ponderable, or intangible and imponderable, as, for example, telegraphic, telephonic or wireless messages.[38]

By the amendment of 1910 [39] of the Interstate Commerce Act of 1887,[40] the Federal regulation of commerce was expressly extended over telegraphic, telephone and cable companies doing an interstate business.

§ 283. Aviation.

That the crossing above State lines by planes, balloons or other vessels navigating the air, is subject to Federal regulation under the Commerce Clause, there can be no reasonable doubt.[41]

§ 284. The Buying or Selling of Bills of Exchange Is Not Interstate Commerce.

In Nathan v. Louisiana [42] the court laid down the doctrine that the buying and selling of foreign bills of exchange, while to be sure an aid to, and an instrument of, commerce, is not itself commerce. "The individual," said the court, "who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit . . . is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on." And also: "A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail."

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[37] 262 U. S. 623.

[38] Pensacola Tel. Co. v. W. U. Tel. Co. (96 U. S. 1); W. U. Tel. Co. v. Texas (105 U. S. 460); W. U. Tel. Co. v. Pendleton (122 U. S. 347); Leloup v. Mobile (127 U. S. 640); W. U. Tel. Co. v. Mass. (125 U. S. 530).

[39] 36 Stat. at L. 539.

[40] 24 Stat. at L. 379.

[41] These air ships can also be regulated under the postal and war powers of the United States, and, of course, the United States can operate such craft as parts of its military and naval forces. For the draft of a proposed act of Congress for the regulation in detail of air craft, see *Report of the American Bar Association*, 1923, p. 384. *Cf.* The Radio Act of February 23, 1927, and The Air Commerce Act of May 20, 1926. Also Smith v. New England Aircraft Co. (170 N. E. 385 [Mass.]).

[42] 8 How. 73, 81.

§ 285. Selling Tickets for Foreign Transportation.

The business of soliciting passengers and selling steamship tickets for passage between the United States and foreign countries is recognized to be a part of foreign commerce. Hence, in Di Santo v. Pennsylvania [42a] a State law was held invalid which required a license to sell such tickets or orders therefor.

§ 286. Bills of Lading.

Congress, by act of August 29, 1916, has sought to increase the negotiability of "order" bills of lading issued by common carriers for the transportation of goods in any Territory of the United States or the District of Columbia, or from one State to another State or to a foreign country, by definitely fixing the law with respect thereto, and by imposing greater responsibility upon carriers and giving greater protection to those who, in the course of commercial transactions deal with both "straight" and "order" bills of lading.

The constitutionality of this law, as a regulation of commerce, was upheld in United States v. Ferger.[43]

§ 287. Base Ball.

In Federal Base Ball Club of Baltimore v. National League [44] it was held that the giving of exhibitions of base ball within the various States is an essentially State affair and does not become an interstate commercial matter by reason of the fact that, in order to give the exhibitions, it is necessary to induce persons to cross State lines to accept positions upon the competing teams of players. This transportation, the court held, was a mere incident and not the essential thing, and, furthermore, the exhibitions did not constitute commerce.

§ 288. Cab Service from Railway Terminals.

It has been held that the maintenance by a railway company of a cab service carrying passengers landing at its city terminals to points within the State for which service a separate charge is made, is not an integral part of transportation of such passengers from points without the State, and, therefore, is not interstate commerce.[45]

[42a] 273 U. S. 34.

[43] 250 U. S. 199.

[44] 259 U. S. 200.

[45] New York *ex rel.* Pennsylvania R. Co. v. Knight (192 U. S. 21). In this case was upheld a State law levying a franchise tax upon the company for the carrying on of the cab service.

§ 289. Trade-Marks and Interstate Commerce.

In Trade Mark cases [46] it was held that the Commerce Clause gives to Congress no power to establish a general or universal system of trade-mark registration, that is, one which is not confined to trade-marks used in foreign or interstate commerce. Hence, the acts of 1870 and 1876, which were not so confined, were held invalid. However, in 1881, Congress enacted a law which was expressly confined in its operation to owners of trade-marks used in commerce with foreign nations or with the Indian tribes. This act did not purport to create trade-marks, but, assuming their existence, provided for their protection, and gave jurisdiction to the Federal courts to punish their infringement or enjoin their use or imitation by persons not the owners of them. The Supreme Court has found no occasion to question the constitutionality of this act.

§ 290. Packers and Stockyards.

In United States v. Union Stock Yard & Transit Co.[47] it was held that a stockyard company with the usual facilities of such yards as to loading and caring for freight, and authorized to operate a railroad system, transporting cars to and from trunk lines in the course of their transportation from beyond the State and to points outside the State, was engaged in interstate commerce. The fact that a service was performed wholly in a State was declared irrelevant if it constituted a part of an interstate transportation transaction.

By Section 15, paragraph 5 of the Interstate Commerce Act, as amended June 29, 1906, June 18, 1910, and February 28, 1920, it was provided that:

"Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments in suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The [Interstate Commerce] Commission may prescribe or approve just and reasonable rules governing each of such expected services."

This provision indicated a control of the stockyards by Congress under its commerce power further than that covered by the Sherman Anti-Trust Act of 1890.

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[46] 100 U. S. 82. See also U. S. Printing Co. v. Griggs & Co. (279 U. S. 156, 158).

[47] 226 U. S. 286. See also Swift & Co. v. United States (196 U. S. 375).

By the Packers and Stockyards Act of August 15, 1921,[48] Congress has provided for the supervision by Federal authority of the business of commission men and live stock dealers in the great stockyards of the country. For the purposes of the act a transaction is declared to be commerce if the article concerned "is part of that current of commerce usual in the live stock and meat packing industries, whereby live stock, meats, meat food products, live stock products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act."

Packers are defined to be persons "engaged in the business (a) of buying live stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing live stock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, live stock products, dairy products, poultry, poultry products, or eggs, in commerce"—that is, in commerce as defined in the paragraph previously quoted.

In Stafford v. Wallace [49] the constitutionality of this act as a regulation of interstate commerce was upheld.

§ 291. Insurance Not Commerce.

The writing, selling, and transmission of insurance policies has been held not to be commerce.

That the business of fire insurance is not interstate commerce was decided in Paul v. Virginia.[50]

That the business of marine insurance is not interstate commerce was held in Hooper v. California.[51]

In New York Life Ins. Co. v. Cravens [52] these cases were cited with approval and applied to life insurance, the court saying: "We repeat, the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea. And we add, or against the uncertainty of man's mortality."

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[48] 42 Stat. at L. 159. The title of the act reads as follows: "An Act to Regulate Interstate and Foreign Commerce in Live Stock, Live Stock Products, Poultry, Poultry Products, and Eggs, and for Other Purposes."

[49] 258 U. S. 495.

[50] 8 Wall. 168. See also Liverpool & L. L. & Fire Ins. Co. v. Mass. (10 Wall. 566); Philadelphia Fire Assn. v. New York (119 U. S. 110).

[51] 155 U. S. 648.

[52] 178 U. S. 389. See also N. Y. Life Ins. Co. v. Deer Lodge County (231 U. S. 495).

§ 292. Lotteries.

By act of March 2, 1893, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," [53] the carriage of lottery tickets from one State to another, whether by mail, or by freight or express was absolutely prohibited. Two objections to the constitutionality of this measure were raised. First, that the regulative power given to the Federal Government over interstate commerce did not include the power absolutely to prohibit that commerce. This objection will be considered in a later section. Secondly, it was objected that lottery tickets are not articles of commerce,—the chief reliance for this contention being the decisions of the court as to bills of exchange and contracts of insurance.

After having been three times argued before the Supreme Court the Lottery Law was upheld in Champion v. Ames, [54] four justices dissenting.

§ 293. Correspondence Schools are Engaged in Interstate Commerce.

In International Text Book Co. v. Pigg,[55] decided in 1910, the court held that the conducting of a "correspondence school" is interstate commerce since it involves the solicitation of students in one State by local agents who are to collect and forward the fees, and systematic intercourse by correspondence between the company and its students, wherever situated, and also the interstate transportation of books, papers, etc.

§ 294. Advertising—Contracts for.

In Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.,[56] an action for triple damages brought under the Anti-Trust Act of 1890, was against the Curtis Company for the alleged attempt by it, to the injury of the Blumenstock Agency, to monopolize certain classes of advertising. The court dismissed the suit upon the ground that the actions complained of did not relate directly to interstate commerce, and, therefore, were not, whatever their character in other respects, within the purview of the act of Congress.

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[53] 28 Stat. at L. 963.

[54] 188 U. S. 321.

[55] 217 U. S. 91.

[56] 252 U. S. 436.

§ 295. Bill Posting.

In Charles A. Ramsay Co. v. Associated Bill Posters [57] it was held that interstate commerce had been restrained and a monopolization thereof attempted by a combination of bill posters throughout the United States and Canada to monopolize the business within their respective localities.

§ 296. Electric Current.

In Public Utilities Com. v. Attleboro Steam and Electric Co. [58] it was declared that the sale of electric current generated in one State to a purchaser in another State, with delivery at the State line, is interstate commerce.

§ 297. Driving Stolen Automobiles from One State to Another State.

By act of Congress of October 29, 1919, known as the Dyer Act, it is provided that "whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5000, or by imprisonment of not more than five years, or both."

In Whitaker v. Hitt,[59] the Court of Appeals of the District of Columbia held that interstate commerce included the driving of an automobile under its own power across State lines, and, therefore, came within the prohibition of the act. The same was held in Kelly v. United States,[60] in which case it was held that an automobile is engaged in interstate commerce whether driven to another State for future sale or for the mere use of the purchaser.

§ 298. Driving Sheep across State Lines.

In Kelley v. Rhoads [61] the Supreme Court held that the driving of sheep from one State to another is an interstate commercial action,—that it is a proper mode of transportation,—and, therefore, that a State tax thereupon is an unconstitutional burden upon interstate commerce.

§ 299. Transportation of Women for Immoral Purposes.

In United States v. Burch [62] the court held that the transportation by automobile of a woman from one State to another for an immoral purpose was interstate commerce and within the constitutional power of

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[57] 260 U. S. 501.

[58] 273 U. S. 83.

[59] 285 Fed. 797.

[60] 277 Fed. 405.

[61] 188 U. S. 1. See also Thornton v. United States (271 U. S. 414).

[62] 226 Fed. 974.

Congress to regulate or punish as provided in the so-called Mann or White Slave Act. The court said: "Interstate commerce, then, is, among other things, the passage of persons from one State to another. It does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare."

§ 300. Transportation of Goods by Private Automobile for Personal Use.

In United States v. Simpson,[63] the court held that interstate transportation by a person of intoxicating liquors for his own personal use and in his own automobile was interstate commerce, and, therefore, was within the purview of the act of Congress of March 3, 1917, known as the Reed Amendment.[64]

In Atlantic Coast Line R. Co. v. Standard Oil Co.,[65] it was held that reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement such as to prevent State regulation of the reshipment. In the instant case the plaintiff maintained large tanks for storing gasoline and oils received from outside the State in which the tanks were situated, but title to such gasoline and oils did not pass to the plaintiff until these products were delivered by it to sellers within the State and settlement with such sellers made, but without any prearrangement at the time the gasoline and oils were shipped into the States as to whom the specific shipments should be sold and delivered. The movement of the gasoline and oils after reaching the storage tanks was held by the court to be intrastate commerce and, as such subject to State regulation. The court said: "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character." [66]

§ 301. Buying and Selling as a Part of Interstate Commerce.

This subject is dealt with in a later section in which the business of drummers and peddlers, in its connection with interstate commerce, is considered.[67]

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[63] 252 U. S. 465. See also United States v. Hill (248 U. S. 420).

[64] 39 Stat. at L. 1069.

[65] 275 U. S. 257.

[66] See also Kansas City Structural Steel Co. v. Arkansas (269 U. S. 148), in which it was held that delivery of goods to a sub-contractor by one who had received the goods as an interstate shipment was intrastate in character.

In Browning v. Waycross (233 U. S. 16) it was held that the installation of lightning rods was not a part of the interstate commerce in such rods, although such installation was provided for in the contract of purchase of such rods.

[67] See §§ 394, 395.

§ 302. Mere Contracts between Persons in Different States Not Interstate Commerce.

The mere making of contracts between persons in different States does not constitute interstate commerce. In Paul v. Virginia,[68] the court, speaking of insurance contracts, said: "They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, . . . do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

As will later be seen in sections of the present work dealing with the matter of State taxation, and especially with reference to the status of drummers and stock and commodity brokers,[69] the test whether agreements to purchase or to sell are to be deemed constituent parts of interstate commercial transactions is as to whether interstate transportation of goods is necessarily involved in their execution.[70]

§ 303. Transactions Preceding Shipment in Interstate Commerce.

It is elsewhere shown [71] that the power of the Federal Government to regulate interstate commerce includes the matter of selling and buying so far as those transactions are directly concerned with interstate commerce. So, also, its authority may be extended to prevent any sort of transactions, whether authorized by the States or the result of individual action, the effect of which is to impede the free course of interstate trade or to bring about results which Congress, in the exercise of its commercial powers, has forbidden. Thus, in Pennsylvania R. Co. v. Clark Bros. C. M. Co.,[72] with reference to an unjust discrimination by a railroad company in the matter of distributing cars to a coal mining company, where the coal, though sold f. o. b. cars at the mine, was to be transported to another State, the court said: "Mere billing or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and provisions of the act to regulate commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply."

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[68] 8 Wall. 168.

[69] *Post,* Chapter XXXVIII.

[70] See especially New York *ex rel.* Hatch v. Reardon (204 U. S. 152), and Ware and Leland v. Mobile County (209 U. S. 405).

[71] See § 301.

[72] 238 U. S. 456.

Summing up earlier decisions, the court, in Dahnke-Walker Milling Co. v. Bondurant,[73] said: "Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original package. On the same principle, where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation." [74]

In this case it was held that a corporation of one State might go into another State, without its leave or hindrance, for all legitimate purposes of interstate commerce, and that the purchase of wheat in one State for delivery on board cars at a point in that State was interstate commerce where the buyer, in continuance of its earlier practice, was purchasing the grain for shipment to its mill in another State.

In Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.[75] it was held that the sale and delivery of coal f. o. b. cars at the mine for transportation to purchasers in other States is interstate commerce—the cars being furnished not for holding or storing coal but, as understood by both the coal company and the railroad, for immediate employment in interstate transportation. "It is plain," said the court, "that supplying the requisite cars was one essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged." [76]

In Shafer v. Farmers' Grain Co.[77] the court held that a State act prohibiting the buying of wheat by grade, without the buyer having obtained a State grading license, and making other requirements with regard to such buying, was an unconstitutional interference with interstate commerce. With regard to the inclusion within interstate commerce of the buying for transportation in such commerce, the court said: "Buying for shipment, and shipping to markets in other States, when conducted as before shown, constitutes interstate commerce; the buying being as much a part of it as the shipping." [78]

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[73] 257 U. S. 282, 290.

[74] Citing Brown v. Maryland (12 Wh. 419); Am. Steel & Wire Co. v. Speed (192 U. S. 500); Am. Express Co. v. Iowa (196 U. S. 133); Welton v. Missouri (91 U. S. 275); Kidd v. Pearson (128 U. S. 1); United States v. E. C. Knight Co. (156 U. S. 1); Addyston Pipe & Steel Co. v. United States (175 U. S. 211).

[75] 242 U. S. 120.

[76] See also Pennsylvania R. R. Co. v. Clark Bros. Coal Mining Co. (238 U. S. 456), in which the court said: "The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce." *Cf.* also United States v. Berwind-White Coal Co. (274 U. S. 564).

[77] 268 U. S. 189.

By Part B of the Agricultural Appropriation Act of August 11, 1916,[79] Congress put into force provisions for the regulation of the buying of grain for interstate or foreign shipment. By this act official grain standards were established and interstate and foreign shipments were forbidden unless the grain should have been previously inspected and found to conform to the standards thus established. In Lemke v. Farmers' Grain Co.[80] the constitutionality of the act was upheld, and a State law declared invalid which sought to impose regulations within the same field.

In the recent case of United States v. Erie R. Co.[81] we find the court again saying that whether or not a shipment is to be deemed interstate in character is not dependent upon when or to whom the title passes, or whether the transaction is initiated or completed under a local bill of lading which is wholly intrastate; but that the question is as to the essential character of the transaction itself. Thus, in this case, the court held that the fact that an agent of a foreign manufacturer had entered into contracts of sale in his own name, and that the goods shipped in fulfilment of such contracts were consigned to and paid for by him, did not render their transportation by rail from the dock to the purchaser's place of business in the same State, intrastate commerce so as to preclude the establishment by the Interstate Commerce Commission of a rate for such shipment.

§ 304. Selling as a Part of Interstate Commerce.

This subject is later dealt with in connection with the Original Package Doctrine.[82]

§ 305. Commerce Does Not Include the Production of the Commodities Transported.

In a series of most important decisions it has been held that commerce does not begin until the goods intended for purchase, sale, or exchange in another State have begun their trip thither. That is to say, they must at least have been placed in the hands of the agents who are to transport them. The mere fact that goods are manufactured to be transported and sold in another or other States, or that they have been segregated in the place where produced, for that purpose, is not sufficient to make them articles of interstate commerce. In some way they must have advanced some distance upon their way outside of the State of production. It is clear, therefore, that the whole process of manufacture or production is definitely excluded from the operation of the commerce clause. "Commerce succeeds to manufacture, and is not a part of it." [83]

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[78] Citing Lemke v. Farmers' Grain Co. (258 U. S. 50); Stafford v. Wallace (258 U. S. 495); Binderup v. Pathé Exchange (263 U. S. 291).

[79] 39 Stat. at L. 482. This part of the Appropriation Act is known as the "United States Grain Standards Act."

[80] 258 U. S. 50.

[81] 280 U. S. 98.

[82] See Chapter XLVII.

§ 306. Intent to Export Not Controlling.

The fact that goods are manufactured for export does not render their manufacture an element in the interstate or foreign commercial transaction.

This principle was clearly laid down in Coe v. Errol.[84] In this case the court held that certain logs cut in New Hampshire and hauled to a river town for transportation to the State of Maine, but not yet actually started upon their final way to that State, had not become articles of interstate commerce.

However, in Sprout v. City of South Bend [85] it was held that "the destination intended by the passenger [on a motor bus] when he begins his journey and known to the carrier, determines the character of the commerce." In this case, the carrier, who claimed to be engaged wholly in interstate commerce, in fact received passengers who, though required to purchase tickets to points outside the State of departure, were discharged within the State. This device, said the court, did not change the legal character of the service. The actual facts of the case, the court declared, must govern.

§ 307. Interstate Commerce Does Not Terminate until Delivery and Sale or Commingling of the Imported Goods with the Goods of the State.

It has been seen that interstate commerce does not begin until, by some definite act, the goods have started upon their trip outside the State of origin. As to the termination of interstate transportation it has been established that this does not occur until the goods transported have reached their destination, been delivered, and either sold or taken out of their original packages in which shipped and commingled with the other goods of the State. The discussion of this proposition will be found in Chapter XLVII under the heading of "The Original Package Doctrine."

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[83] United States v. E. C. Knight Co. (156 U. S. 1). See also Kidd v. Pearson (128 U. S. 1).

[84] 116 U. S. 517. See also Crescent Cotton Oil Co. v. Mississippi (257 U. S. 129); Eureka Pipe Line Co. v. Hallanan (257 U. S. 265), and Dahnke-Walker Milling Co. v. Bondurant (257 U. S. 282).

[85] 277 U. S. 163.

CHAPTER XXXIX

FEDERAL REGULATION OF COMMERCE

In the preceding chapter the meaning of the term "Interstate and Foreign Commerce," as constitutionally determined, was considered. In the present chapter we shall deal with the meaning of the term "to regulate" as employed in the Commerce Clause; with the question as to the exclusiveness of the Federal commerce power; and with the manner in which Congress has exercised or sought to exercise this power.

§ 308. Extent of the Regulating Power of Congress over Interstate Commerce.

There is no question but that Congress has a comprehensive power to regulate, according to its discretion,[1] every phase and feature of interstate commerce. It is, however, to be observed that this does not vest in Congress the right to regulate all acts or activities of persons, whether pertaining to interstate or not, because of the fact that they are engaged in interstate commerce. This doctrine was emphatically declared in Howard v. Illinois Central R. Co.[2] in which the Federal Employers' Liability Act of 1906 [3] was held invalid because not limited in its application to employees of carrier companies while engaged in interstate as distinguished from intrastate commerce.

§ 309. Regulation Defined.

In the sections which follow it will be found that, by successive interpretations, the Supreme Court has given a very broad meaning to the power vested in Congress to "regulate" interstate and foreign commerce, so that it is made to include not only almost every possible phase of the actual transportation of goods and commodities, but, not to mention other subjects, the relation of carriers to their employees, so far as these can be deemed to have any effect upon that actual transportation, the fixing of the charges, maxima and minima, that may be made for transportation, to the prohibition of discriminatory practices, the consolidation or non-consolidation of railways, the common use of terminal facilities, the exclusion of commodities from transportation, the provision by the United States Government itself of transportation facilities, the issuance of securities by private companies, and even the "recapture" of earnings of these companies in excess of a fair return upon their properties. In Dayton-Goose Creek Ry. Co. v. United States[4] was involved the constitutionality of the so-called "recapture" paragraphs of the Transportation Act of 1920[5] according to which incomes earned by railways in excess of a fair return are to be held by them as trustees for the United States, one-half of such excess to be paid into a reserve fund to be maintained by the railway, and the other half into a general revolving fund to be maintained by the Interstate Commerce Commission. The court said: "It is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the Commerce Clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." After citing cases in support of the proposition that, if it desires to do so, the United States may, under its commerce power, itself construct and operate or authorize others to construct and operate national highways, bridges from State to State, and other instrumentalities for carrying on interstate commerce, the Chief Justice said: "If Congress may build railroads under the Commerce Clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service."

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[1] Provided, of course, it does not violate other provisions of the Constitution, as for example those relating to due process of law, preference of ports, etc.

[2] 207 U. S. 463.

[3] 34 Stat. at L. 232.

It is thus seen that the regulatory power of Congress over interstate commerce may be exercised not only with a view to the interests of those parties directly engaging in it in specific instances, but with regard to the general interests of the public as a whole, and that, therefore, the regulations prescribed may relate to the railways as a whole and have for their aim the maintenance of a general system of or of general systems of transportation which will best serve the interests of the entire people of the United States.[6]

§ 310. Federal Commerce Power Plenary in Character.

The control of interstate and foreign commerce being granted to the Federal Government without limitation, the grant is, according to the general principle governing the interpretation of grants of Federal power, construed to be plenary. This was stated in absolute terms by Marshall in Gibbons v. Ogden,[7] and has not been since questioned.[8]

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[4] 263 U. S. 456, 478, 479.

[5] Chapter 91, § 422, 41 Stat. at L. 456.

[6] This feature of regulation first found expression in the Transportation Act of 1920 and was shown not only in the "recapture" provisions of that act but in the provision regarding the division of joint rates. For a consideration of this act see *post*, §§ 334, 335.

§ 311. Exclusiveness of Federal Control over Interstate Commerce.[9]

The Federal authority over interstate commerce is not in terms made exclusive, and the courts have at times varied their views as to the extent to which an exclusiveness is to be deemed implied. From the beginning the States acted upon the assumption that they were not deprived of power to grant to persons and corporations exclusive privileges with reference to the carrying on upon land of commerce between themselves and other States; and this practice was acquiesced in by the Federal Government. As to the carrying on of interstate commerce by water, however, it seems to have been more generally held that the Federal jurisdiction was exclusive. This, however, was not judicially determined until the decision of the great case of Gibbons v. Ogden.[10]

A review of the cases which followed Gibbons v. Ogden will show, however, that the doctrine of the Supreme Court as to the exclusiveness of Federal authority over commerce has not been a uniform one. Without abandoning the doctrine that the States are constitutionally disqualified from directly interfering with the regulation of commerce, the Supreme Court has, at times, upheld State acts which have in fact amounted to substantial interferences with interstate and foreign commerce. And, indeed, the language of the court, and even of Marshall himself in certain cases, implied the adoption of the doctrine that the constitutionality of a State law in regulation of, or interfering with, the freedom of interstate and foreign commerce was to be tested rather by the existence of a conflicting Federal statute, than by the exclusiveness of the Federal jurisdiction.

Space cannot be spared to trace the variety of views expressed at different times by the Supreme Court as to the exclusiveness of the Federal regulatory power over interstate commerce, but the history of the doctrine may be found in the cases cited in the footnote.[11] The doctrine declared in the last of these cases—Cooley v. Port Wardens—may be said to be the present doctrine of the court.

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[7] 9 Wh. 1.

[8] In Champion v. Ames (188 U. S. 321) the court, after a review of adjudged cases, said: "The cases cited . . . show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions in the exercise of power as are found in the Constitution of the United States."

[9] For an article tracing in an especially scholarly manner the development of the doctrine of the relation of Federal to State control of commerce, see 28 *Harvard Law Review*, 34, "The Evolution of Federal Regulation of Intrastate Rates" by W. C. Coleman.

[10] 9 Wh. 1.

This doctrine, declared to be firmly established, was stated by Justice Field in Bowman v. R. R. Co.[12] as follows: "Where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

As regards the supremacy of the Federal regulatory power over interstate commerce as compared with the power of the State to legislate with reference to matters that may directly or indirectly affect that commerce, the court, in the Minnesota Rate Cases,[13] said: "If a State enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which, in the absence of Federal regulation, should be free. . . . On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted. . . . The power of Congress to regulate commerce among the several States is supreme and plenary. . . . There is no room in our scheme of Government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. . . . It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation." [14]

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[11] Brown v. Maryland (12 Wh. 419); Wilson v. Blackbird Creek Co. (2 Pet. 245); New York v. Miln (11 Pet. 102); License Cases (5 How. 504); Passenger Cases (7 How. 283); Cooley v. Port Wardens (12 How. 299).

[12] 125 U. S. 465.

[13] Simpson v. Shepard (230 U. S. 352, 396, 398, 399).

§ 312. Exclusiveness of Federal Legislation Often a Matter of Statutory Construction.

The question whether State laws which affect interstate commerce, without directly burdening it, are to be deemed constitutional, has, in a good many cases, been decided by the Supreme Court as a matter of statutory construction; that is, whether Congress has or has not, by its enactment, evinced an intention so fully to cover the fields to which they relate that no constitutional opportunity is left to the States to enter these fields, even, it may be, to supplement the Federal provisions, and not to authorize measures that are inconsistent with them. The question whether or not Congress has intended to prevent concurrent or ancillary legislation upon the part of the States will be specifically considered in connection with examination of the various acts which Congress has enacted under its commerce powers.

§ 313. Federal Incorporation of Companies for the Promotion or Carrying on of Interstate Commerce.[15]

The Federal Government has the undoubted power itself to own and operate, or to incorporate, companies for the construction and operation of roads, bridges, and other instrumentalities of interstate commerce.[16] This authority is derived not only from the Commerce Clause, but from the authority of the Federal Government to establish post-offices and post-roads, and from its military powers. And, incidental to the exercise of these powers, the right of eminent domain may be exercised by the Federal Government or by corporations chartered by it, within the States and Territories.[17]

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[14] Citing Cooley v. Port Wardens (12 How. 299), and other later cases. For further discussion of the Minnesota Rate cases, see *post*, § 387.

[15] On the general constitutional power of Congress to incorporate companies, see the series of articles by Myron W. Watkins, entitled "Federal Incorporation" in 17 *Michigan Law Review*, 64, 145, 238; and the article entitled "The Power of Corporations Created by Act of Congress" by E. Q. Keasbey, in 32 *Harvard Law Review*, 689.

On the power of Congress to incorporate companies derived from the Commerce Clause, see the article "Federal Incorporation of Railway Companies" by C. W. Bunn in 30 *Harvard Law Review*, 589; and the article "Federal Power to Own and Operate Railways in Peace Time" by J. A. Fowler, in 33 *Harvard Law Review*, 775.

In Wilson v. Shaw [18] the authority of the United States to construct the interoceanic canal across the territory ceded by the Republic of Panama, was declared.

Whether or not the United States may incorporate companies to do an interstate selling or shipping business is not so certain, as the exercise of the power has never been attempted, and has not, therefore, been subjected to judicial examination. Inasmuch, however, as it is established that interstate and foreign commerce includes the buying and selling of the commodities transported in such commerce, as well as the contracts relating thereto, it would seem extremely likely that the Federal right to charter companies to carry on these phases or branches of interstate and foreign commerce would, if exercised, be upheld by the courts.

In connection with this question of Federal incorporation several ancillary questions of great interest suggest themselves. These are: (1) whether a Federally chartered carrier company may be granted also the right to do an intrastate carrier or manufacturing business; (2) whether a Federally chartered jobbing or shipping corporation may be granted the right to do an intrastate jobbing or shipping and selling business, or to manufacture the commodities which it sells or ships; (3) whether a company may be Federally chartered to manufacture goods for export to other States or to foreign countries: and, if so, whether it may incidentally be authorized to sell its products within the State where manufactured; (4) whether persons and companies may be denied the right to engage in interstate and foreign commerce unless they have obtained Federal licenses or charters; and (5) finally, whether the persons or corporations thus licensed or chartered may be subjected to Federal control with reference to all branches of their business,—those not relating to interstate commerce as well as those so relating.

That the courts will recognize that a corporation Federally chartered to do an interstate carrier business may also be granted the incidental authority to do an intrastate carrier business is highly probable, for the reason that the two kinds of transportation are so closely connected that, as was held with reference to the doing of a Federal banking business in connection with the performance of their Federal functions, it is not feasible to separate the two. The doctrine laid down in Southern Ry. Co. v. United States [19] and the inseparable relation between interstate and domestic commerce recognized in the Minnesota Rate cases, and W. U. Tel. Co. v. Kansas [20] go very far towards supporting this view.

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[16] California v. Central Pacific Ry. Co. (127 U. S. 1); Monongahela Navigation Co. v. United States (148 U. S. 312); Luxton v. North River Bridge Co. (153 U. S. 525).

[17] Kohl v. United States (91 U. S. 367); Cherokee Nation v. S. Kansas Ry. (135 U. S. 641).

[18] 204 U. S. 24.

More doubtful than the question just considered is the one whether a Federally chartered interstate carrier may be granted the incidental right to manufacture the commodities, or certain of them, which it transports. Here, as a practical proposition, it is impossible to show that there is a connection between the producing and the transporting of commodities so intimate that the two may not be separated, and independently conducted. That the two are distinct has been repeatedly declared by the Supreme Court [21] and, indeed, Congress has by law, as is well known, forbidden interstate carriers to transport commodities (with certain exceptions) which they have themselves manufactured.

Whether or not a Federal corporation chartered to engage in interstate commerce as a shipper or seller may be incidentally granted authority to ship and sell or to manufacture within the several States depends upon the same conditions which have been discussed with reference to carriers. If the courts should find that, in fact, it is not practicable to dissociate the two, they will hold that the constitutionality of the primary power will carry with it that of the incidental authority.

However, it seems reasonably certain that the courts cannot, without departing from earlier doctrines, sustain the power of Congress to incorporate companies empowered to manufacture goods within the States, and to sell them outside the States of manufacture, for, in such case, the primary purpose would be the manufacturing, and the incidental purpose the transportation. But the Federal Government is conceded to have no direct authority to regulate manufacturing within the State. Such power, which it has within this field, can only be upheld, if upheld at all, as necessarily incidental to the exercise of the power to regulate interstate commerce.

It is established that the fact that a railway company is organized under a Federal charter does not necessarily, that is, without congressional provision to that effect, exempt it from the same regulative control by the States as that to which State-chartered companies are subject.[22]

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[19] 222 U. S. 20.

[20] 216 U. S. 1.

[21] Coe v. Errol (116 U. S. 517); Kidd v. Pearson (128 U. S. 1); United States v. E. C. Knight Co. (156 U. S. 1).

§ 314. Federal Taxing Power and Interstate Commerce.

A Federal tax may be laid upon interstate commerce, its instrumentalities, the articles carried, or the privilege of engaging in it, either as a revenue measure or as a means of regulation. If the tax should be laid for a regulative purpose, its constitutionality would be dependent wholly upon the Commerce Clause, and, not being, except in form, a tax, would not be subject to the express limitations as to apportionment, etc., imposed by the Constitution upon the exercise of the taxing power by the United States.[23]

A genuine tax imposed for revenue purposes, if assessed upon the commodities of interstate commerce or upon the instrumentalities of commerce as property, would be a direct tax and would have to be apportioned among the States according to their respective populations. That this is so sufficiently appears from the doctrines of Knowlton v. Moore.[24]

If the tax should be one upon the privilege of engaging in, or carrying on interstate commerce, it would in all probability be construed to be constitutionally an indirect tax.[25] The case that would probably be held controlling as to this is Nicol v. Ames [26] in which a stamp act on sales made at an exchange or board of trade was held to be not a direct tax on the property sold, but an indirect tax in the nature of an excise on the facilities offered at the exchanges or boards of trade.[27]

A more doubtful point, however, is whether such an excise tax upon the right to engage in interstate commerce would not come within the constitutional provision that "no tax or duty shall be laid on articles exported from any State." That it would be held to be a tax on exports from a State would seem to follow from the reasoning of the court in Brown v. Maryland; [28] but, if the doctrine of Woodruff v. Parham [29] be followed, it will be held that the prohibition of the Constitution applies only to exports from a State to foreign countries.

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[22] Reagan v. Trust Co. (154 U. S. 418); Smyth v. Ames (169 U. S. 466).

[23] *Cf.* Veazie Bank v. Fenno (8 Wall. 533).

[24] 178 U. S. 41.

[25] Although economically a direct tax.

[26] 173 U. S. 509.

[27] See also Spreckels Sugar Ref. Co. v. McClain (192 U. S. 397); and Flint v. Stone Tracy Co. (220 U. S. 107). In Pollock v. Farmers' L. & T. Co. (158 U. S. 601) the court by way of caution said: "We do not mean to say that an act . . . might not lay excise taxes on business, privileges, employments and vocations," without needing to be apportioned.

[28] 12 Wh. 419.

[29] 8 Wall. 123.

§ 315. Federal "Police Power" with Regard to Commerce.

Congress has enacted various laws for the regulation of interstate and foreign commerce, which, so far as their substance is concerned, may properly be denominated police regulations. Among them are those relating to the use of safety appliances, hours of service of employees, monthly reports of accidents, arbitration of controversies between railroads and their employees, the exclusion of impure goods and lottery tickets from interstate transportation, employers' liability, etc. Strictly speaking, however, the constitutional authority for this legislation has not been derived from any general "police power" possessed by the Federal Government, but from the grant of authority in the Commerce Clause. That these laws, in so far as they are constitutional, draw their validity from this clause and not from a Federal police power is a corollary from the general doctrine that the General Government possesses no powers whatever except by way of express grant, and by implication from such grants.

Space cannot be spared to deal, in a general way, with the considerable number of measures, beginning with the Interstate Commerce Act of 1887, enacted by Congress in regulation of interstate commerce. They are dealt with in considerable detail in the author's larger work *The Constitutional Law of the United States*.[30] Here it will be necessary to confine the discussion to certain of the more important decisions of the Supreme Court with reference to such legislation.

§ 316. Hours of Labor and Erdman Acts Upheld.

In Northern Pacific R. Co. v. Washington,[31] the court upheld by necessary implication, the constitutionality of the Hours of Labor Act of March 4, 1907 and also declared that the statute was so comprehensive as to preclude the States from legislating in the premises.

In Adair v. United States [32] the court upheld the constitutionality of Section 10 of the act of June 1, 1898, known as the Erdman Act, the aim of which was to prevent the blacklisting of employees, to make unlawful the requirement by the employing railroad of an agreement upon the part of its employees to release the road from liability for injuries to the employees, and, in general, to protect labor organizations. In several of the lower Federal courts these provisions had been declared unconstitutional as a denial of due process of law, as well as not regulatory of interstate commerce, and, therefore, not within the commerce power of Congress.[33]

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[30] See chapters XLV, XLVI, XLVII, XLVIII, XLIX, L of that work.

[31] 222 U. S. 370.

[32] 208 U. S. 161.

[33] In 1913 the Erdman Act was replaced by the so-called Newlands Act—38 Stat. at L. 103.

§ 317. Interstate Commerce and the Regulation of Wages: The Adamson Act.

By the Adamson Act of September 3, 5, 1916, entitled "An Act to Establish an Eight Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce, and for Other Purposes," [34] Congress despite this title, sought to fix the compensation to be paid to the employees rather than to establish the legal length of their working days.

The act was an emergency measure, passed in order to prevent a general strike upon the part of the railway employees and a consequent serious interference with railway transportation.

The constitutionality of this act came before the Supreme Court and was upheld in the case of Wilson v. New, decided in 1917.[35] It is, however, to be observed that it is by no means sure that the case of Wilson v. New can be cited as authority for the exercise by Congress of a wage-fixing power under all circumstances, for, in the first place, the court qualified its holding by saying that, "under the circumstances disclosed," the wage fixing amounted to a compulsory arbitration of a dispute between the carriers and their employees, by establishing as to the subject-matter under dispute, a binding legislative standard; and, in the second place, that the interference with the private rights of the parties had taken place only after those parties had failed to exercise their right to come to an agreement. It may be, then, that, if, in the future, Congress should attempt further wage-fixing legislation, it will be declared by the court that the case of Wilson v. New can be deemed authority only as applied to substantially similar conditions of fact, that is, of extreme emergency and of the failure of the parties themselves to adjust their wage disputes.

§ 318. The Federal Interstate Commerce Employers' Liability Law of 1906.

In 1906 Congress passed an act entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to their Employees," [36] by which act the fellow-servant doctrine of the common law was considerably modified. By the terms of this act "every common carrier in trade or commerce" in the District of Columbia or in the Territories or between the several States was made liable for the death or injury of "any of its employees" which should result from the negligence of "any of its officers, agents, or employees." It thus appears that the provisions of the acts were made applicable to these companies irrespective of the fact whether the person injured or killed was engaged at the time in interstate commerce. The only criterion prescribed was that the employing company was one carrying on commerce among the States. There was thus raised the fundamental question whether the simple fact that a company or corporation is, in any part of its business, engaged in carrying on interstate commerce renders it subject to Federal regulation as to all its activities. There was also raised the question whether the relation between an employing company and its employees is itself a part of the interstate commerce which the company carries on. Both of these questions were discussed in Howard v. Illinois Central R. Co.[37]

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[34] 39 Stat. at L. 721.

[35] 243 U. S. 332. Four justices dissented.

[36] 34 Stat. at L. 232.

The first and more important question the court answered in the negative, as has been earlier pointed out.[38] As to the second question, the court said: "We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce."

The court then went on to hold the act void as to the States because its application was not limited by its terms to injuries and deaths incurred by persons while engaged at the time in interstate commerce.[39]

§ 319. Employers' Liability Law of 1908.

In order to meet the constitutional objections raised by the Supreme Court to the act of 1906, Congress in 1908 enacted a measure similar to the earlier law except that its provisions were expressly confined to actions growing out of injuries or deaths to persons while actually engaged in the carrying on of interstate commerce.[40]

In Mondou v. N. Y., N. H. & Hartford Ry.,[41] this liability law of 1908,[42] was declared constitutional as being in regulation of interstate commerce.[43]

§ 320. Interstate Commerce Act of 1887.

As early as 1880, the Federal Senate exhibited its concern in the railway situation, especially in the Middle West, by appointing a committee of investigation, known as the Windom Committee. No concrete legislative results followed from the work of this Committee, but, the evils of discriminatory rates continuing to increase, the Senate, in 1886, appointed another Committee,—the Cullom Committee. Largely as a result of the work of this Cullom Committee, Congress, in 1887, enacted the Interstate Commerce Act, which was approved by the President on February 4.[44]

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[37] 207 U. S. 463.

[38] See *ante*, § 268.

[39] The law in a later case was held valid as to the District of Columbia, and inferentially as to the Territories. El Paso & Northeastern Ry. Co. v. Gutierrez (215 U. S. 87).

[40] 35 Stat. at L. 65.

[41] 223 U. S. 1.

[42] As amended April 5, 1910, 36 Stat. at L. 291.

[43] See also New York Central R. Co. v. Winfield (244 U. S. 147); St. Louis I. M. & S. R. Co. v. Hesterly (228 U. S. 702); and Seaboard Etc. Co. v. Horton (233 U. S. 492).

This statute marked the beginning of a new era with regard to the exercise by the United States of its regulatory powers under the Commerce Clause of the Constitution. The act is still in force, but has been repeatedly amended or supplemented for the purpose of giving to the Commission which the act created wider and more effective authority. As thus amended and supplemented by other congressional statutes, the act now (1930) requires more than two hundred pages of fine print for its statement.

§ 321. The Interstate Commerce Commission.

For the enforcement and administration of its provisions, the act of 1887 created a Commission composed of five members, to be appointed by the President with the advice and consent of the Senate, with six-year terms. By later legislation the Commission has been enlarged to eleven members and their terms of office increased to seven years. Their annual compensation is now $12,000.

From time to time the enforcement and administration of additional legislative requirements with regard to interstate commerce have been imposed upon the Interstate Commerce Commission.

In 1893 was enacted by Congress the first of a series of laws with regard to the employment by interstate commercial carriers of devices and methods for the prevention of accidents; for example, the use of automatic couplers, continuous systems of heating, the adoption of the "block" system in the running of trains, etc.

By act of June 1, 1898, the Chairman of the Commission was directed to attempt the settlement, through mediation and conciliation, of labor controversies involving interstate commerce, and, in the event of failure to secure settlement by such means, to try to bring about arbitration of the controversies according to methods prescribed in the act.[45]

In 1906 Congress provided that, after May 1, 1908, it should be unlawful for railroads to transport in interstate commerce any commodity, other than timber or its manufactures, which they might own in whole or in part, or in which they might have any interest, direct or indirect, except such commodities as might be necessary or intended for their own use as common carriers. This so-called "Commodities Clause" had for its chief purpose the separation of the railroads from the coal mines which a number of them owned or controlled.[46]

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[44] 24 Stat. at L. 378.

[45] 30 Stat. at L. 424.

In 1917 the Commission made a comprehensive study of the rates and operating practices of companies doing an interstate express business, and, founded thereupon, promulgated orders establishing through routes and joint rates to take the place of the through rates which the companies had previously charged, made up of the sum of local rates. Rules were also established by the Commission tending to prevent the practice of double collections of charges, that is, from both consignors and consignees. Furthermore, the method of computing rates by dividing the country into zones was put into force.

By act of July 28, 1916,[47] the Commission was directed to prescribe the rules in accordance with which the railroads should be compensated for carrying the mails and for all services by them in connection therewith.[48]

The Commission has performed a most valuable and difficult work in the matter of prescribing the manner in which the interstate carriers shall keep and report their accounts, and of making a valuation of railway properties.[49]

A great variety of other duties have been laid upon the Commission with regard to the orders they may issue to carriers in regard to the doing of an interstate transportation business, which it is not practicable here to specify. A considerable number of them, however, will receive incidental mention in connection with the discussion of cases decided in the Supreme Court with regard to the legislative and constitutional powers of the Commission.

§ 322. Development of the Power of the Interstate Commerce Commission to Enforce Its Orders.

In the section which has immediately preceded a statement has been made of the manner in which the functions of the Commission have been increased since its establishment in 1887. There will now be considered the authority which the Commission has to secure the information needed by it, in order to discharge its duties, and the means it has for securing an enforcement of its orders. It will be found that during the early years of its existence, and largely due to decisions of the Supreme Court, the Commission was without the legal means of exercising effectively the regulatory jurisdiction confided to it by law, but that, by later legislation, this administrative weakness has been corrected.

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[46] For cases construing and applying this law, see *post*, § 371.

[47] 39 Stat. at L. 412.

[48] See the opinion of the Commission of December 23, 1919, 56 I. C. C. 1.

[49] The act imposing this latter duty upon the Commission was that of March 1, 1913, and amended by acts of February 28, 1920, 41 Stat. at L. 456, and June 7, 1922, 42 Stat. at L. 624. See Interstate Commerce Act, Sec. 19a. For a brief statement of the work of the Commission in connection with the valuation of railways, see Dixon, *Railroads and Government*, pp. 69–76.

§ 323. Compelling Testimony.

In 1892, in the case of Counselman v. Hitchcock,[50] the Supreme Court held that the Commission could not compel a witness to give testimony which might tend to incriminate himself. This decision, it was seen, would seriously interfere with the power of the Commission to obtain the information needed by it in order effectively to exercise its regulatory functions. By act of February 11, 1893,[51] therefore, Congress provided that no person should be excused from testifying or producing documents and other evidence upon the ground that he would thus tend to incriminate himself, but that he should not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might thus be compelled to testify or produce evidence.

This act was held constitutional by the Supreme Court in the case of Brown v. Walker.[52]

By act of June 30, 1906 [53] it was provided that the immunity, mentioned above, "shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath." Though granted immunity from subsequent criminal prosecution with reference to the matters thus testified to, it was provided that the witness should be liable for perjury committed when so testifying.[54]

§ 324. Enforcement of Rulings and Orders of the Commission.

During the early years of the existence of the Commission the processes provided for securing an enforcement of its rulings or orders were as follows: A complaint having been made to the Commission by a shipper, a hearing would be had and a decision rendered, which, however, the carrier would obey or not as it might see fit. If the carrier did not obey, the Commission was obliged to apply to a Federal court for the issuance of an injunction or mandamus to compel obedience to the order. Upon such application a trial would be had in which the courts felt themselves empowered, and even obligated, to review the entire facts of the controversy, and, based upon such a review, to issue its own decree in the premises. In these judicial proceedings the findings of fact by the Commission were given only a *prima facie* value.[55] Nor did the courts hold themselves bound to consider only the evidence that had been submitted to the Commission. They asserted and exercised the right to approach the matter *de novo* and to receive and consider such other and further testimony as the parties might see fit to introduce. From this judicial decree an appeal might be taken which could be pursued to the Supreme Court of the United States. Two results followed: "There was intolerable delay in the redress of grievances; and, in the second place, all definite proceedings were postponed until the case had gone on appeal to the courts. In other words, the Commission, instead of being a coördinate body with the courts, was reduced to an entirely subordinate position. Its function became merely to institute proceedings, and thereafter to appear as a complainant before the other tribunals competent alone to decide the case." (Ripley. *Railways, Rates and Regulations*, I. p. 460.)

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[50] 142 U. S. 547.

[51] 20 Stat. at L. 443.

[52] 161 U. S. 591.

[53] 34 Stat. at L. 798.

[54] For further discussion of the inquisitorial powers of the Interstate Commerce Commission, see Harriman v. Int. Com. Com. (211 U. S. 407); and Smith v. Int. Com. Com. (245 U. S. 33).

§ 325. Rate-Making Power of the Commission Denied.

The greatest blow to the Commission came, however, when the Supreme Court held that it had no power to fix the rates which interstate carriers were to charge for their services. Doubt as to the existence of this power upon the part of the Commission had been suggested by the court in Cinn. N. O. & Texas Pac. Ry. v. Interstate Commerce Commission [56] and, in Interstate Commerce Commission v. Cinn. N. O. & Texas Pac. Ry.[57] its existence was expressly denied.

§ 326. Long and Short Haul Clause of the Interstate Commerce Act Practically Nullified.

The Commission had received a body blow from the Supreme Court in the Maximum Freight Rate case, but this did not mark the end of the injuries to its powers which it was to suffer. In the next year, in the case of Interstate Commerce Commission v. Alabama Midland Ry.[58] the court practically nullified the long and short haul clause of the act of 1887 by overruling the holding of the Commission that the existence of competition between rival routes could not be held to constitute that dissimilarity of circumstances and conditions which would justify the charging of a greater compensation in the aggregate for the transportation of passengers or of like kinds of property for a shorter than for a longer distance over the same line in the same direction.[59]

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[55] See especially Kentucky and Indiana Bridge Co. v. Louisville and Nashville R. R. (37 Fed. 567).

[56] 162 U. S. 184.

[57] 167 U. S. 479. This case is known as the Maximum Freight Rate case.

[58] 168 U. S. 144.

§ 327. The Elkins Act of 1903.

In response to public dissatisfaction growing out of the rapid consolidation of railways and the rise of railway rates that had taken place since 1900, and to the demands of prominent railway men themselves who appreciated the losses of revenue accruing to their roads from rebating and rate-cutting, Congress, in 1903, enacted the Elkins law amending and strengthening the Interstate Commerce Act of 1887, by providing that the penalties therein provided for should apply to the railway companies themselves and not merely to their officers, and that the published rates should be deemed the standard of lawfulness and that departures therefrom should be deemed misdemeanors.[60]

A further change effected in the law of 1887 by the Elkins Act was with regard to modes of proof of violations of the act. As construed by the courts, the original act required the Commission to show not only that secret and preferential rates had been given by a carrier, but that other shippers of like and contemporaneous shipments had paid rates higher than the secret and preferential ones. That is, it had been necessary to prove discrimination as a fact between shippers who, by reason of receiving the same services, were entitled to the same rates. The practical result of this requirement had been, as the Commission said in its Seventeenth Annual Report,[61] to render prosecutions extremely difficult, if not impossible, because the necessary evidence was rarely obtainable.

Other provisions of the Elkins law were those which permitted the Commission to include as parties in its proceedings, in addition to the carriers themselves, all persons interested in, or who would be affected by, the proceedings; and which conferred jurisdiction upon the Circuit Courts of the United States to restrain departures from published rates or any forbidden discriminations by injunction or other appropriate writ —a writ that was to be enforcible against interested parties as well as the carrier.

The constitutionality of the Elkins Act as regards its imposition of liability upon the carrier companies for acts of their employees or officers in violation of the Interstate Commerce Act, was upheld by the Supreme Court in N. Y. Central & H. R. Ry. v. United States.[62]

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[59] Sec. 4 of the act of 1887.

[60] The act abolished the penalty of imprisonment which, in 1889, had been added to those provided for in the act of 1887.

[61] Dated December 15, 1903, p. 8.

[62] 212 U. S. 481.

§ 328. The Hepburn Act of 1906—The Commission Given Rate-Making Powers.

By the so-called Hepburn Act of June 29, 1906,[63] Congress gave to the Interstate Commission, by express provision, the right, after a full hearing upon a complaint or after an investigation made by the Commission on its own initiative, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged." [64]

The Hepburn Act also extended the field of Federal regulation to include pipe lines, express companies and sleeping-car companies. Transportation was defined as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Also, switches, spurs, terminals, etc., were declared to come within the scope of the Federal regulations. It should be noted, however, that, though transportation partly by rail and partly by water was included, transportation wholly by water was not included.

§ 329. The Right of Congress to Delegate its Rate-Making Power to a Commission.

That a legislature may delegate to a commission as its agent the application to specific cases of a rule legislatively declared is established. There would thus seem to be no constitutional difficulty in Congress laying down certain principles of railway rate regulation, and intrusting to a commission or other administrative body the task of determining the rates which conform to these requirements. If, therefore, it be desired that interstate railway rates shall be fixed by Federal authority, it is clear that it is not necessary that Congress should itself determine each specific rate. Congress must, however, lay down the rule or rules by which the body to which this function is delegated shall be guided.

By the act of June 29, 1906, it is declared by Congress that "charges for interstate transportation of passengers as property shall be just and reasonable;" and to the Interstate Commerce Commission is given the authority, after having decided that a rate in force is not a proper one, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged." Thus the only rule for determining the rates which Congress has declared for the guidance of the Commission in the fixing of specific rates is that they shall be just and reasonable. The determination of when these very general requirements are met by a rate is left, in each case, to the judgment of the Commission.[65]

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[63] 34 Stat. at L. 584.

[64] As amended by acts of June 18, 1910 (36 Stat. at L. 539) and February 28, 1920 (41 Stat. at L. 484), the rate-fixing authority now reads: "to determine and prescribe what will be the just and reasonable individual or joint-rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be fair and reasonable, to be thereafter followed."

§ 330. Court Review of Orders of the Commission.

A very important matter to be considered by those who framed and enacted the Hepburn Law was as to the power of the courts to review the orders of the Interstate Commerce Commission; that is, should they have the broad right to review the orders in all respects, or only as to points of law that might be involved; and, pending final judicial decision, should they have the right by writs of injunction to suspend the enforcement of the orders? In this connection, arose the constitutional question whether Congress had the power, should it desire to exercise it, to limit the exercise of the courts' powers in these respects. Upon these points there was an extended discussion in and out of Congress, and, in result, it was provided that the courts should have the unrestricted power to hear and determine all suits against the Commission, to set aside, annul, or suspend any order or requirement of the Commission. This was thought, at the time, to be a victory for those who had argued for a "broad review" by the courts, but, as later appeared when the matter came before the Supreme Court, the courts claimed only a "narrow" power of review.

In Interstate Commerce Commission v. Illinois Cen. R. Co. (Car Distribution case), [66] the court said: "Beyond controversy, in determining whether an order of the Commission shall be sustained or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power (citing cases). Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

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[65] As to the conclusiveness of such determinations, see § 324.

[66] 215 U. S. 452, 470.

In another case, decided shortly after the Car Distribution case,[67] the court, however, held that it would not consider itself conclusively bound as to findings of facts by the Commission upon which its claim to statutory competence was based.

In Interstate Commerce Commission v. Union Pac. R. Co.[68] upon an appeal brought by the Commission from a decree of a lower court enjoining certain reductions which the Commission had ordered in rates filed with it by the carriers concerned, the Supreme Court made the following statement with regard to the finality and conclusiveness of the Commission's orders: "In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

§ 331. General Considerations with Regard to Reasonableness of Rates.

It is established that the fact that a rate high enough to escape from the charge of being confiscatory as regards the public service corporation rendering the service, and, therefore, a taking of its property without due process of law, is not necessarily the maximum rate which may be regarded as just and reasonable to the corporation or to the public. In other words there is, or may be, a region between rates which are confiscatory as regards the companies rendering the services, and those which are unreasonably high as regards the public, within which the rate-making authorities may exercise a certain degree of discretion. This doctrine has been declared in numerous decisions of the Interstate Commerce Commission, and has recently been definitely stated by the Supreme Court in the case of Banton v. Belt Line Ry. Corp.[69] decided in 1925. In that case the court said: "A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. The mere fact that a rate is nonconfiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate." [70]

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[67] Int. Com. Com. v. Northern Pac. R. Co. (216 U. S. 538). See also Texas & Pac. R. Co. v. Abilene Cotton Oil Co. (204 U. S. 426); Penn. R. Co. v. Int. Coal Co. (230 U. S. 184); Mitchell Coal & Coke Co. v. Penn. R. Co. (230 U. S. 247); Morrisdale Coal Co. v. Penn. R. Co. (230 U. S. 304).

[68] 222 U. S. 541, 547. See also Penn. R. Co. v. Puritan Coal Mining Co. (237 U. S. 121); Va. R. Co. v. United States (272 U. S. 658).

In further explanation of the foregoing the following distinctions are to be borne in mind: first, between the power of the courts to enforce the common-law obligation of public services and of industries affected with a public interest to maintain rates which will not be extortionate, that is, which will be reasonable as regards the public; second, as to the power of the courts, according to American constitutional principles, to determine the validity of rates fixed by legislatures; and third, the function of the courts to determine the validity of rates fixed by administrative bodies which have been legislatively empowered so to do, but with the requirement that the rates thus fixed shall be just and reasonable. As regards the first of these three judicial functions, it is to be noted that it extends no further than the restraining of the services from fixing and enforcing rates which will be unduly oppressive or extortionate, that is, unreasonable, as regards the public. As regards the matter of legislatively fixed rates, the judicial function extends no further, under American constitutional principles, than to determine whether these rates are so unreasonably low as to be unjust to the companies rendering the services and thus to operate, as to them, as a taking of property without due process of law. Such legislatively fixed rates may not be questioned by the courts upon the ground that they are too high, and, therefore, oppressive to the public, for it is the peculiar province of a legislature to determine what is just and reasonable as regards the public. When, however, the courts are called upon to examine the validity of rates fixed by administrative bodies acting under a legislative authority so to do, but under a legislative mandate that the rates so fixed shall be just and reasonable, the situation is a different one. Here, the courts may, and, in fact, are obligated, when the matter is presented to them in proper form, to examine these rates not only as regards their reasonableness and justness to the companies rendering the services, but as regards also their reasonableness or justness to the public. Thus, it is competent for the courts to hold a given rate to be illegal because so low, under all the circumstances of the case, as not to yield a reasonable percentage return to the company upon the fairly valued property used by it. The courts may also hold such an administratively determined rate to be so high as to be unduly oppressive or extortionate to the public. It is, however, to be noted that, in fact, the courts have seldom, if ever, found it necessary to hold an administratively fixed rate invalid upon this last ground. However, their power so to do has been repeatedly asserted.

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[69] 268 U. S. 413, 422, 423.

[70] Citing: Trier v. Chicago, St. P., M. & O. R. Co. (30 Inters. Com. Rep. 352, 355); Holmes & H. Co. v. Great Northern R. Co. (37 Inters. Com. Rep. 627, 635); Dimmitt-Caudle-Smith Live Stock Commission Co. v. Chicago, B. & Q. R. Co. (47 Inters. Com. Rep. 287, 298); Detroit & M. R. Co. v. Michigan R. Commission (203 Fed. 864, 870).

From the foregoing it is seen that, as already pointed out, a rate may be deemed to be a reasonable one, if fixed directly by a legislature, however much it may exceed one which would satisfy the constitutional requirement that property shall not be taken without due process of law. And, even as to rates fixed under legislative mandate by administrative bodies, there is possible a considerable range of reasonableness above the confiscatory point. In other words, such an administratively fixed rate does not become unreasonable, as viewed from the standpoint of the public, because it exceeds, to some extent, the minimum that would be required in order to prevent it from being confiscatory in character.

The foregoing observations have been made because the courts, in the reasoning contained in the opinions which they have rendered, have not always taken pains to emphasize the distinctions which have been pointed out, with the result that their various declarations, considered apart from such distinctions, have not always appeared to be harmonious, or, at any rate, not easily analyzable in order to determine the exact propositions intended to be contained in them.

§ 332. Reasonableness of Specific Rates a Matter for Final Judicial Determination.

In Munn v. Illinois,[71] decided in 1877, rate-making was declared to be, essentially, a legislative function, and, for a while, the Supreme Court seemed to be inclined to the view that a legislatively fixed rate could not be judicially attacked upon the ground that it was so low as to be confiscatory in its effect upon the railway or other public utility furnishing the service. However, it soon became an established doctrine that rates of railroads or of other public services, or of industries affected with a public interest must meet the test of reasonableness, and that the determination whether or not, in fact, they do meet this test, is a matter for final determination by the courts.[72]

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[71] 94 U. S. 113.

With regard to the reasonableness of a rate fixed by a legislature or by a legislatively authorized commission, it is to be observed that a company is not constitutionally entitled to a rate which will enable it to earn a reasonable net profit independently of the efficiency or inefficiency with which it is organized and operated.[73]

It is clear that no precise statistical or financial criteria are available to the courts or to the legislatures for determining what is a reasonable charge for services rendered by public services when that reasonableness is judged from the point of view of the interests of the public or community which is served. So far as a general rule can be laid down, it would seem, therefore, that it must be stated negatively, and to the following effect: The legislature may require that none of the carriers or other public services operating within a given general area may charge for their services more than is sufficient to give to them, taking them as a whole, a net income that will yield a reasonable return upon their properties, fairly valued, and operated with reasonable efficiency and economy. More than this cannot constitutionally be demanded in behalf of the public's interest. It is apparent, however, that, as the courts have said, this rule may, as to roads or other public service plants which have been unwisely located, or extravagantly constructed, or built at a time when the cost of materials and work was greater than it is at the time the legislatively-fixed rate is applied, operate to deny to those roads a return upon their investments that, as a general market proposition, would be deemed a fair and reasonable one.

A rate so low as to be deemed by the courts to be confiscatory is unconstitutional, and, under the American system of constitutional jurisprudence, the legislature cannot, constitutionally, deny to the courts the jurisdiction to examine whether the legislatively fixed rate is of this character. But, as to the reasonableness of rates above the minimum that would be confiscatory, the legislature is the sole judge. Thus, in fact, the legislature may prescribe a rate or rates which, as judged by general market and industrial conditions, will permit the services concerned to earn excessive profits. In such cases the courts can interpose no veto, however unjust, in fact, the results are to the consuming public, for, by its very constitutional nature, the legislature is deemed to be the proper organ for determining public policies, that is, what the public interests require or justify. In other words, the courts are permitted to raise the issue of the public interests only when the regulated services themselves allege that a legislatively prescribed rate is not as high as it should be. The public using the public services may not question in the courts the constitutionality of the legislatively prescribed rates. Where, however, the legislature has directed an administrative agency to fix rates that are just both to the concerns supplying the services and to the public, the rates thus fixed may be attacked in behalf of the public upon the ground that, by fixing the rates unreasonably high, this legislative mandate has not been obeyed.[74]

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[72] See Chicago G. T. R. Co. v. Wellman (143 U. S. 339); Reagan v. Farmers' Loan and Trust Co.(154 U. S. 362); Smyth v. Ames (169 U. S. 466), and many later cases.

[73] See Chicago & G. T. R. Co. v. Wellman (143 U. S. 339); Reagan v. Farmers' Loan and Trust Co. (154 U. S. 362); Covington Turnpike Co. v. Sandford (164 U. S. 578), and many later cases.

§ 333. Valuation of Property and Rate Regulation.

The question as to the criteria to be accepted by the courts in determining whether or not a legislatively prescribed rate is a reasonable one, or, at least, that it is not so low as to be confiscatory in character, received, for the first time, an adequate discussion by the Supreme Court in Smyth v. Ames, decided in 1898, and resulted in the doctrine that the company rendering a public service is entitled to a reasonable percentage return upon the fair present value of its properties as determined, in considerable, and, perhaps, large part, by what would be the cost of reproducing them. It was, however, only after a long series of cases that this doctrine became a fixed one.[75]

§ 334. Novel Principles of Rate Regulation Prescribed by the Transportation Act of 1920.[76]

The enactment of the Transportation Act of 1920 marks the adoption by the Federal Government of a new railway policy. With reference

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[74] As to the right of public service to cease operation, see the author's larger work, *The Constitutional Law of the United States*, vol. II, § 521. See also the articles by Professor F. P. Hall, "The Discontinuance of Service by Public Utilities" in 13 *Minnesota Law Review*, 181, 325. For a recent case in the Supreme Court, see United Fuel Gas Co. v. Railroad Commission (278 U. S. 300).

[75] See San Diego Land and Town Co. v. National City (174 U. S. 739); Simpson v. Shepard (230 U. S. 352); Missouri v. Public Service Com. (262 U. S. 276); San Diego Land and Town Co. v. Jasper (189 U. S. 439); Knoxville v. Knoxville Water Co. (212 U. S. 1); Willcox v. Consolidated Gas Co. (212 U. S. 19); Bluefield Waterworks and Imp. Co. v. Public Service Com. (262 U. S. 679); Galveston Electric Co. v. Galveston (258 U. S. 388); St. Louis & O'Fallon R. Co. v. United States (The O'Fallon

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[76] 41 Stat. at L. 456. Space will not permit a discussion of the other provisions of this important act.

to the fixing of rates, the act adopts the proposition that in order to enable the less advantageously located railways to obtain a fair return, which the act fixes at six per cent on the value of their properties, and be able to give to their respective localities the transportation facilities needed by them, it is necessary to fix rates higher than those similarly needed by the more advantageously situated roads. Uniform rates are, however, desirable. Therefore, it is declared that if, in any year, a railway receives a net operating income in excess of six per centum of the value of its property, it shall place one-half of that excess in "Reserve Fund," kept by itself and pay the other half to the Interstate Commerce Commission to be used by it as a "Revolving Fund."

The constitutionality of this so-called "Recapture Clause" of the Act was upheld in Dayton-Goose Creek R. Co. v. United States.[77]

§ 335. Joint Rates.

As another means of securing the legitimate needs of all the roads, weaker and stronger alike, and, at the same time, protecting the interests of the public, the Transportation Act provides that the Interstate Commerce Commission may establish joint rates and provide the manner in which the receipts from them shall be divided between the carriers concerned. The constitutionality of this provision was upheld by the court in Akron C. & Y. Ry. Co. v. United States.[78]

§ 336. Valuation of Railroads by the Interstate Commerce Commission.

It has abundantly appeared that, in order that a proper determination may be reached as to the just and reasonable rates that carriers may charge, it is necessary to consider, chiefly, even if not solely, the value of the properties used by the carriers. Early in the history of Federal regulation the railways had been required to render accounts of their operations, but it was found impossible, from the data thus obtained, to fix the value of the properties concerned.

By act of March 1, 1913, Congress directed the Commission to make a valuation of the properties of all the carriers subject to its regulation, and prescribed various factors to be considered in arriving at this valuation. This legislative direction was not sufficient, however, to prevent differences of opinion upon the part of the different members of the Commission, as well as by others, as to what relative weight should be given to these various factors.

Case) (279 U. S. 461); United Railways & Elec. Co. of Baltimore v. West, (280 U. S. 234); and other cases discussed in vol. II, § 522, of the author's *The Constitutional Law of the United States.*

[77] 263 U. S. 456.

[78] 261 U. S. 184.

§ 337. Shippers by Water—Federal Regulation of.

By the Shipping Act of September 7, 1916,[79] as amended by the act of July 15, 1918,[80] and the Merchant Marine Act of June 5, 1920,[81] powers with respect to rates charged by water carriers on the high seas and on the Great Lakes between ports in different States have been given to the Shipping Board which, so far as they go, are similar to those exercised by the Interstate Commerce Commission with reference to railways. The Shipping Board is composed of five Commissioners, increased to seven by the Merchant Marine Act, appointed by the President by and with the advice and consent of the Senate with official terms of six years. The Board, besides its regulatory powers, has extensive powers with regard to the building, purchasing, selling, chartering and operation of merchant vessels, and the establishment of corporations for purchasing, equipment, leasing, chartering, maintenance and operation of merchant vessels.

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[79] 39 Stat. at L. 728. The act is entitled "An Act to Establish a United States Shipping Board for the Purpose of Encouraging, Developing, and Creating a Naval Auxiliary and Naval Reserve and a Merchant Marine to Meet the Requirements of the Commerce of the United States with its Territories and Possessions and with Foreign Countries; to Regulate Carriers by Water in the Foreign and Interstate Commerce of the United States; and for Other Purposes."

[80] 40 Stat. at L. 900.

[81] 41 Stat. at L. 988.

CHAPTER XL

THE ANTI-TRUST ACTS

§ 338. Sherman Anti-Trust Act.

On July 2, 1890,[1] was enacted a law entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." The first two sections of this measure read as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2, it will be observed, broadens the prohibition of Section 1 by introducing the element of monopolization as distinguished from "restraint of trade."

Section 3 makes the prohibition of restraints of trade applicable within the Territories and District of Columbia, and to commerce between them and any State of the Union or a foreign State.

Section 4 gives jurisdiction to the Circuit Courts of the United States to prevent and restrain violations of the act, and directs the several District Attorneys of the United States to institute proceedings in equity to prevent and restrain such violations, and specifically provides that the courts may issue, in appropriate cases, restraining orders or prohibitions, pending final decrees.

Section 5 provides for the issuance of subpœnas to bring before the courts the parties proceeded against.

Section 6 provides that "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section 1 of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law."

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[1] 26 Stat. at L. 209.

Section 7 provides that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee."

The last section (8) of the act declares that where the words "person" or "persons" are used in the act they are to be deemed to include corporations and associations existing under or authorized by the laws of either the United States, a Territory, a State, or any foreign country.

The foregoing provisions of this important law, often spoken of as the "Sherman Act," have remained without important change, though they have been added to, especially with regard to foreign commerce and labor combinations, and with regard to the administration of the act. These supplementary and amending acts will receive notice in the discussion which is to follow.

It will be observed that, in the Sherman Act, no specific reference is made to railways. This fact, coupled with the further fact that, by the Interstate Commerce Act of three years before (1887), the railways had been forbidden to form "pools" for the maintenance of interstate freight or passenger rates, led many to hold that the Sherman Act had not been intended by Congress to apply to combinations or contracts between interstate railways. However, in United States v. Trans-Missouri Freight Association,[2] decided in 1897, it was held by the Supreme Court that the provisions of the act did apply to railways.

There was also, for a considerable time, a question whether the prohibitions of the act applied to combinations or conspiracies of laborers or trade unions. In the Danbury Hatters' case [3] it was held that they did apply.

In *Re* Greene,[4] a case involving the status of the Distilling and Cattle Feeding Company, which controlled 75 per cent of distilled liquors in the United States, the court held that the mere magnitude of an interstate business did not bring it within the prohibition of the Anti-Trust Act.[5]

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[2] 166 U. S. 290.

[3] Loewe v. Lawlor (208 U. S. 274).

[4] 52 Fed. Rep. 104.

The first case construing and applying the act to reach the Supreme Court was the so-called Sugar Trust case, styled United States v. E. C. Knight Co.[6]

In this case it was contended by the Government that the acquisition by the American Sugar Refining Company of the stock of a number of sugar refining corporations of Pennsylvania was with the object and effect of establishing a substantial monopoly of the industry, and that, inasmuch as the product was sold throughout the country and distributed among the States, the provision of the act of 1890 with reference to the monopolization or combination or conspiracy to monopolize trade and commerce among the States was violated. The court, however, applying the doctrine of Coe v. Errol [7] and Kidd v. Pearson,[8] held that the act did not, and constitutionally could not, extend to combinations, conspiracies or monopolies relating to the manufacture of commodities, this being a field reserved exclusively to the States. The fact that interstate or foreign trade might be incidentally affected was declared not material.

The doctrine thus laid down by the court has never been departed from, and is, indeed, one from which there would seem to be no logical escape, if the line which divides Federal control of interstate commerce from State regulation of local industries and manufacturing is to be maintained. In applying this doctrine, however, the court, in later cases, has shown a somewhat greater readiness to find, in the acts complained of, a direct interference with interstate commerce, and, therefore, a ground for the application of the Federal statute.

In United States v. Trans-Missouri Freight Association[9] the act was held to apply to railroads, and moreover, that contracts or combinations in restraint of trade were to be deemed prohibited, whether or not those contracts were in themselves reasonable. In this case a contract between several railway companies was held illegal, and the resulting association, the purpose of which was to maintain rates, and prevent competition over a territory including a number of States, was dissolved.[10]

In United States v. Joint Traffic Association [11] the doctrine of the Trans-Missouri Freight Association case was affirmed. In that case the constitutional power of Congress to prohibit all contracts in restraint of interstate trade, whether reasonable or unreasonable, was questioned, and the possible far-reaching effect of an act invalidating business contracts and partnership agreements brought to the attention of the court. As to this the court said that the formation of corporations simply for business or manufacturing purposes had never been regarded as contracts in restraint of trade, and that the same is true as to partnerships. "We are not aware," the opinion continued, "that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade, within any legal definition of that term."[12]

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[5] "It is very certain that Congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition, either by the private citizen or state corporation.

[6] 156 U. S. 1.

[7] 116 U. S. 517.

[8] 128 U. S. 1.

[9] 166 U. S. 290.

[10] Four justices dissented.

[11] 171 U. S. 505.

In Hopkins v. United States [13] it was held that a live stock commission merchant whose place of business was a certain stockyard and who there bought and sold stock for others, was not engaged in interstate commerce, within the meaning of the act of 1890, although the stock was shipped to him from another State. Therefore, it was held, the rules and regulations of an association of live stock commission merchants, fixing the rates to be charged, were not agreements affecting interstate commerce.

In Anderson v. United States,[14] decided the same day as the Hopkins case, an association of dealers in live stock, providing by its rules that its members should not transact business with non-members, nor with commission men who should deal with non-members, was held not a combination or conspiracy in restraint of interstate trade, inasmuch as it appeared that membership was open to all dealers, and no attempt was made to control prices or the number of cattle bought or in any way to prevent full competition between the members. In this case the ground taken by the court was, not so much that the combination did not relate to interstate commerce, as that there was no restraint upon commerce imposed by its rules, or an attempt to monopolize such commerce.

In a series of cases, beginning with Addyston Pipe & Steel Co. v. United States,[15] the court has shown that combinations or agreements between manufacturers or dealers do not come within the protection of the doctrine of the Knight case if it appear that the attempt is made in any way directly to control or change what would normally be the course of interstate commerce in the absence of such combinations or agreements.

In the Addyston case six companies, engaged in the manufacture and sale of iron pipe, had formed a combination whereby competition in the sale of pipe throughout the United States was practically destroyed. In the exercise of the power thus possessed, the combination had allotted to its several member companies the territory within which each should have the exclusive right to sell its products. By a unanimous opinion the court held the agreement to come within the prohibition of the act of 1890.

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[12] It is to be observed, however, that, in the Trans-Missouri Freight Association case, the technical legal definition of the phrase "restraint of trade" as used in the act of 1890 had been repudiated.

[13] 171 U. S. 578.

[14] 171 U. S. 604.

[15] 175 U. S. 211.

In Montague v. Lowry [16] was held illegal, as a restraint of interstate commerce, an association of dealers in the State of California and manufacturers in other States, with the purpose of controlling the sale of their product in California. Here there was no allotment of territory, as in the Addyston case, and, except as to the provision of the agreement that the non-resident manufacturers should sell their product only to the members of the association in California, no interstate transactions were regulated. This provision, however, it was held, rendered the entire combination a violation of the act of 1890, "It was not a combination or monopoly among manufacturers simply but one between them and dealers in the manufactured article of commerce between the States."

In the so-called Merger case—Northern Securities Co. v. United States [17]—the act of 1890 was held applicable to a combination of stockholders in the competing interstate railway companies, the aim, or at least the effect of which was to prevent or render possible the prevention of competition between the two roads by transferring their stock to a single holding company, organized under the laws of a State, which holding company thereby became possessed of a controlling interest in the stock of each of the railway companies.

In this case it was strenuously urged that the combination or agreement represented by the holding company was one which, in itself, had no direct relation to interstate commerce, the company being an investment company and not itself a carrier company; and that the question thus reduced itself to whether the United States had, under its commercial power, the constitutional authority to regulate the transference and holding of the shares of stock of State corporations.

To this argument the court replied that the real question at issue was not as to the power of the United States to regulate the holding of stock of State corporations, but as to the power of State corporations to restrain or monopolize interstate commerce. It was admitted that contracts or combinations relating to the holding of stock of interstate carrier companies have not, generally speaking, a direct relation to interstate commerce, and therefore, that, as to them the doctrine of the Knight case would apply. The Merger Company, however, was not a *bona fide* investment company, but was, in its very inception and sole design, a scheme for controlling interstate commerce. Its relation to interstate commerce was thus a direct one.

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[16] 193 U. S. 38.

[17] 193 U. S. 197.

In result, the chief significance of the Merger case was as to the authority assumed by the court to look beneath the surface of acts, and, irrespective of their formal character, to hold them subject to the provisions of the Anti-Trust Act, if, thus viewed, they disclose a plan to restrain, or a capability of restraining, interstate trade.

The so-called Beef Trust case—Swift & Co. v. United States [18]—decided in 1905, added no new principle to the law of interstate commerce. The act of 1890 was held to have been violated by a combination of independent meat dealers in an attempt to monopolize commerce in fresh meat among the States, and to restrict the competition of their respective buyers when purchasing stock for them in the stockyards. It is significant, however, that the court emphasized that the unlawfulness of the general scheme was sufficient to render unlawful the constituent acts, which, in themselves, and apart from their place in the general scheme, might not have been in violation of the Anti-Trust Act. "The plan may make the parts unlawful."

In Loewe v. Lawlor [19] the court took a very advanced ground as to what will be construed to be an interference with interstate commerce. In this case the act of 1890 was held to have been violated by a combination of members of a labor organization, in the nature of a boycott, to prevent the manufacture of hats intended for transportation beyond the State, and to prevent their vendees in other States from reselling the hats, and from further negotiating with the manufacturers for further purchases. In order to bring this combination within the terms of the Federal statute the court again emphasized that, where the general purpose and effect of the plan is to restrain interstate trade, the separate acts, though in themselves acts within a State and beyond Federal cognizance, become illegal as tested by the Federal law.

§ 339. Standard Oil Case: The Rule of Reason.

In 1911 the Supreme Court decided the important case of Standard Oil Co. v. United States,[20] in which the Standard Oil Company of New Jersey and other corporations, together with several individual defendants, were proceeded against under the Anti-Trust Act, and a decree obtained against them in the lower court according to which it was adjudged that the combining of the stocks of the various companies in the hands of the Standard Oil Company of New Jersey constituted a combination in restraint of trade and also an attempt to monopolize the interstate trade in petroleum. By this decree the Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over some thirty-seven subsidiary companies, and these companies were enjoined from paying any dividends to the Standard Oil Company, or permitting it to exercise any control over them by virtue of its stock ownership or other powers acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any other or similar combination which would violate the decree; and, finally, these companies and individuals were enjoined from engaging in interstate commerce in petroleum so long as the illegal combination should remain in existence.

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[18] 196 U. S. 375.

[19] 208 U. S. 274.

[20] 221 U. S. 1, 58, 60, 62.

In order to show that the acts of the defendants complained of were within the meaning of the terms "monopolizing" and "restraint of trade" as employed in the act of 1890, the court found it necessary to develop a "rule of reason," which, since then, has played an important part in the construction and application of the Anti-Trust Acts. According to this criterion, not every contract or combination which operates to restrain free competition between the parties is to be deemed within the prohibition of the act, but only those contracts which aim at a monopolizing of the trade or business or which are unreasonable in the sense that they can be said to be prejudicial to the public interest, or, rather, to the public policy of Congress as embodied in the act; or, furthermore, as scarcely needs to be said, which can be viewed as directly, and not merely incidentally or indirectly, affecting interstate or foreign commerce. It thus appears that no hard and fast rule or precise criteria as to the legality of combinations or restraints of trade can be laid down. Each case must depend upon its own facts.

The court recognized that, in taking this position, it might seem to depart somewhat from language which had been used in the cases of United States v. Trans-Missouri Freight Association, and United States v. Joint Traffic Association but, as to such earlier language, said that, so far as it might be separated from the facts of those cases, it was to be deemed "limited and qualified" by the instant case.

§ 340. The American Tobacco Company Case.

In United States v. The American Tobacco Co.,[21] decided only a few days after the Standard Oil case, the court stated still more emphatically the "rule of reason" as necessary to be applied in construing and applying the act of 1890.

In United States v. United States Steel Corporation[22] it was held that a holding company, organized by former competitors and greater in size and productive power than any of its competitors, and, in fact, equal or nearly equal to them all taken together, was not in violation of the act when it appeared that a monopoly had not, in fact, been created which was able to fix prices and suppress direct and effective competition. In this case it appeared that the Steel Corporation, a holding company, had, early in its history, resorted to pools, associations, trade meetings, etc., in order to fix or control prices, but that these practices had been discontinued before the bringing of the suit. This being so, these former practices, the court said, were not to be considered.

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[21] 221 U. S. 106.

[22] 251 U. S. 417.

In the Tobacco and the Standard Oil cases, as contrasted with the instant case, the opinion declared, the court had had to deal with "a persistent and systematic lawbreaker masquerading under legal forms, and which had not only to be stripped of its disguises but arrested in its illegality."

The foregoing have been only some of the more important cases arising under the Anti-Trust Act. For other cases, the reader must consult special treatises.[23]

§ 341. Webb-Pomerene Exporters' Act.

By the Webb-Pomerene Export Act of April 10, 1918,[24] it is provided that nothing contained in the Sherman Act shall be construed as declaring illegal an association "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: and provided further, that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." The Webb Act also provides that the Clayton Act shall not be construed "to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States." The Webb Act does, however, provide that the unfair methods of competition forbidden by the Federal Trade Commission Act shall be construed "as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."

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[23] Or consult the author's *The Constitutional Law of the United States*, vol. II, pp. 864–890.

[24] 40 Stat. at L. 516. The act is entitled "An Act to Promote Export Trade and for Other Purposes."

The enforcement of the foregoing and other provisions of the act is placed in the hands of the Federal Trade Commission.[25]

§ 342. Edge Act.

In connection with the Webb-Pomerene Act it is perhaps proper to refer to the Edge Act of 1919[26] which represents a further effort on the part of Congress to stimulate the foreign trade of the United States even though the act does not rest for its constitutional validity upon the Commerce Clause of the Constitution.

This act, which is in amendment of the Federal Reserve Act, authorizes the formation of banking corporations under Federal charters to do foreign banking, to finance exports, and, in general, to promote the export trade of the United States. The charter thus to be granted must be filed with and approved by the Federal Reserve Board. Within the United States the banks thus provided for may receive deposits only as incidental to their foreign transactions. Their capital stock must as a minimum be $2,000,000, and a majority of it must be owned by American citizens. A general supervision over their operations is vested in the Federal Reserve Board.

§ 343. China Trade Act.

Also, in connection with congressional legislation for the promotion of foreign trade, may be mentioned the China Trade Act of 1922,[27] as amended by the act of February 26, 1925.[28]

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[25] For the provisions of the Clayton and Federal Trade Commission Acts, see the next chapter.

[26] 41 Stat. at L. 378.

[27] 42 Stat. at L. 849.

[28] 44 Stat. at L. 53.

CHAPTER XLI

UNFAIR COMPETITION: THE CLAYTON AND FEDERAL TRADE COMMISSION ACTS

It has been seen that, by the Interstate Commerce Act of 1887, amended by the Elkins Act of 1903, railway discriminations in interstate commerce, and the receiving as well as the giving of rebates were forbidden. By the Anti-Trust Act of 1890 the monopolizing or the restraining of interstate trade by means of contracts, combinations or conspiracies had also been prohibited, and, by the adoption and application by the court of the so-called "rule of reason" in determining what constitutes a restraint of trade within the meaning of the act, the Supreme Court had furnished some criteria for determining the propriety of business practices, and of the circumstances under which, or the purposes for which, concerted action between actual or potential competitors would be viewed as legally permissible, or, at least, as not embraced within the prohibitions of the Anti-Trust Act.

So long as the Federal law remained in this shape the distinction between "good trusts" whose legal right to exist might not be denied, and "bad trusts" which might be dissolved, was not a clear-cut one, nor, generally speaking, was it easy for business men of the country to determine what competitive methods they might legally employ and what would subject them to legal prosecution. Also, it is not to be denied that there was a considerable opinion throughout the country that the Supreme Court had assumed a power which Congress had not vested in it by the Sherman Act, namely, to determine according to its own economic judgment what were, and what were not, to be deemed legal combinations of labor or of capital. Still further there was a general opinion that the prohibitions contained in the Anti-Trust Act with reference to contracts, combinations or conspiracies in restraint of interstate trade, and to the monopolizing of such trade, were not broad enough to include many practices in the business world which were believed to be opposed to sound public policy and to constitute unfair competitive methods. To meet these views Congress, in 1914, enacted two important pieces of legislation:—the one, entitled the Clayton Act[1] and the other the Federal Trade Commission Act.[2]

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[1] 38 Stat. at L. 730.

[2] 38 Stat. at L. 717.

§ 344. The Clayton Act.

The provisions of this important legislative measure are too elaborate to permit them to be here given, but it may be said that, in addition to providing certain requirements regarding labor and injunctive proceeding, which will be later referred to, the act specifically prohibits various transactions the tendency of which will tend to restrain competition in or to monopolize interstate commerce, such as discrimination in price between different purchasers of commodities,—acquisition in whole or part by one corporation of the stock of other competitive corporations, etc.

§ 345. The Federal Trade Commission Act—Unfair Competition.

By this act "unfair methods of competition" in interstate and foreign trade were declared unlawful and a Commission created for determining when such unfair methods are being employed and for issuing the necessary orders for their abandonment.

With regard to the operative features of the Act it is to be observed that they are administrative as distinguished from judicial in character, at least to the extent of providing that no private individual can initiate in the courts a suit under the act, and that no court is authorized to act except upon a prior complaint presented to the Commission and an order issued by that body. This is not true of the Clayton Act which, upon petition by the United States, vests original jurisdiction in the District Court to restrain violations of its provisions, and which (Section 16) permits private individuals or corporations as well as the Federal Trade Commission itself to ask for injunctive relief.

Prior to the passage of the Clayton and Federal Trade Commission Acts, the terms "unfair methods of competition," or, more shortly, "unfair competition," had had reference almost exclusively to methods involving fraud in the form of misrepresentation or in other ways. The illegality of these practices was, of course, undisputed and the power of the courts to enjoin them was well established. There was, therefore, no legislation needed to meet the evils resulting from these practices. It is clear, therefore, that Congress, by the declaration in Section V of the Federal Trade Commission Act, that "unfair methods of competition in commerce are hereby declared unlawful," and by empowering the Commission to prevent their use, had in mind something more than misrepresentative or other fraudulent practices. In other words, the attempt was to prevent acts that are economically unfair as applied to competitive business.

It is to be observed that no attempt was made by the statute to define or specify the practices which are to be deemed to constitute "unfair competition." This is a task which was deliberately left to be performed by the Commission itself and by the courts, but, undoubtedly, with the expectation that the Commission, in the first instance, and the courts, on appeal, would be guided by standards which had been previously worked out in the common law or in cases interpreting the Anti-Trust Acts. But, being thus left undefined, and, therefore, not restricted to specified practices, the jurisdiction of the Commission was expected to be broad enough to reach every kind of commercial conduct that might fairly be said to be opposed to the public interest, clearly unethical, or unduly oppressive to competitors.

With reference to most of the unfair competitive methods which it was undoubtedly the purpose of the Federal Trade Commission Act to prevent, it is to be said that they were those which, as experience had shown, large concerns of a monopolistic or *quasi*-monopolistic character were accustomed to employ for the purposes of either obtaining or perpetuating their monopolistic or dominating control of the market. Thus, these unfair methods of competition, though they are to be judged of, as to their legality, without regard to the matter of monopolization of the trade, are, in fact, in very many, and the most important cases, found closely connected with attempts to monopolize or otherwise restrain trade.

The fact that so many, and, among them, the most important, of the methods of unfair competition which had come to prevail in the modern business world were thus available only to large operating concerns explains why there had not been built up in the common law legal principles condemning them, for such doctrines as existed had been developed before these large concerns, corporate or otherwise, had become prominent in business. Furthermore these common-law principles were, for the most part, available for the punishment or correction of competitive abuses rather than for their prevention. For these reasons, then, it was deemed necessary by Congress, in its effort to conserve to the public the benefit of the freest and fairest of competitive conditions, to supplement the Anti-Trust Acts by the broad declaration that all competitive methods that could be deemed "unfair" should be deemed illegal, and to create a commission with authority to issue orders, when necessary, requiring that such methods be not employed. Henceforth, then, the courts and the Interstate Commerce Commission were to attend to the matter of unjust discriminations and contracts or combinations in restraint of interstate or foreign trade, or the monopolization or attempt to monopolize such trade, while the Federal Trade Commission was to have the authority (supplemented of course by that of the courts) to prevent or correct all other methods which could be deemed to injure the public by depriving it of the benefits which, it was believed, accrue from the maintenance of competitive conditions which permit the operation of business concerns which are able to justify themselves by reason of the efficiency with which they are organized and administered. The legislation of 1914, then, sought to extend the protection of Federal law and of Federal regulation to the smallest as well as to the largest of the businesses engaged in interstate and foreign trade, and, with especial reference to the smaller concerns, to protect them against predatory or fraudulent practices upon the part of their larger and more powerful competitors, which would exterminate them without regard to the efficiency with which they might be organized and operated.

It will obviously not be practicable in this treatise to deal with the manner in which the Trade Commission has dealt with the hundreds of cases which have been presented to it, or which it has itself, *ex proprio motu* considered, in which the charge has been made that unfair competitive practices have been resorted to. This information must be found in the reports of the Commission. We can here deal only with the more important cases in which the courts have been called to determine whether the Commission has properly exercised its jurisdiction, whether as a matter of statutory construction or of constitutional power. Before considering these, however, it will be necessary to refer to a line of cases in which, prior to the enactment of the Clayton and Federal Trade Commission Acts, the Supreme Court had dealt with resale and "tying" contracts which could be viewed as illegally restraining competition in interstate trade.

§ 346. Maintenance of Resale Prices.

In an important series of cases the Supreme Court has considered the question whether attempts upon the part of manufacturers to control the prices at which commodities sold by them may be resold by the retailers are in violation of the Anti-Trust Act as being in restraint of trade. These attempts have usually taken the form of giving special inducements to those retailers who agree to abide by the prices fixed by the manufacturers, or by the refusal of the manufacturers to sell to persons who do not so agree or act.

As a preliminary proposition it may be laid down that, in the absence of concerted action in the premises upon the part of producers, each of them has the right, so far as the Anti-Trust Acts are concerned, to determine, upon any or no reasonable grounds, to whom he will sell his commodities, and upon what terms. Indeed, it is probably correct to say that this right is secured to him by the due process clause of the Fifth Amendment against any possible legislation by Congress. This constitutional point was not passed upon in the case of United States v. Colgate & Company,[3] but in that case it was squarely determined that the Anti-Trust Acts do not deny the right.

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[3] 250 U. S. 300.

In the case of Dr. Miles Medical Company v. John D. Park & Sons,[4] a different situation was presented, in that the element of agreements to monopolize were charged and sustained. The evidence showed that there had been a plan to control the entire trade in the medicines concerned, interstate as well as intrastate, by means of two forms of restrictive agreements to one or the other of which parties desiring to sell the medicines were required by the manufacturer to subscribe as a condition precedent to being supplied with the medicines.

In Bement v. National Harrow Co.[5] the Supreme Court for the first time was called upon to consider the bearing, if any, which the legal monopolies provided for by the patent and copyright laws have upon the prohibition of monopolization in the anti-trust laws. In that case it was held that these laws do not "refer to that kind of restraint of interstate commerce which may arise from reasonable and legal restraints imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

In Standard Sanitary Mfg. Co. v. United States,[6] commonly spoken of as the Bath Tub Trust case, the court held that the Sherman Act applied to a combination between a number of manufacturers of enamelled ware controlling eighty-five per cent of the market, according to which they had agreed not to sell their products to jobbers except at prices fixed by a committee of their number. It also appeared, in this case, that the wholesalers could not obtain these products if they did not maintain these prices. To the contention that, by these agreements, the manufacturers were doing nothing more than protect the patent rights possessed by them and employed in the manufacturing of their products, the court said that the agreements involved were similar to those which had been condemned in Montague v. Lowry,[7] and that the added element of patent rights could not confer immunity from a like condemnation.

In Dr. Miles Medical Company v. John D. Park & Sons[8] the claim was made, but not sustained by the Supreme Court, that, because "proprietary" articles manufactured according to a secret formula were involved, there was a right to maintain resale prices which otherwise might not exist. In the case of Henry v. A. B. Dick & Co.,[9] however, the court found that, with reference to articles manufactured under patent rights, there existed a right upon the part of the manufacturer to retain a considerable degree of control over the use of articles or commodities after they had been sold. In this case the Dick Company had sold patented mimeograph machines to which were attached license plates purporting to require that the machines should be used only with ink, paper, and other materials made by the Dick Company. The defendant, Henry, having sold other ink with the knowledge that it was to be used with the Dick machines, was held by the court to have infringed the mimeograph patent.

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[4] 220 U. S. 373. See also United States v. Schrader's Son (272 U. S. 85).

[5] 186 U. S. 70.

[6] 226 U. S. 20.

[7] 193 U. S. 38.

[8] 220 U. S. 373.

[9] 224 U. S. 1.

This holding was expressly overruled by the court in Motion Picture Patents Co. v. Universal Film Manufacturing Co.[10] Before this, however, in Bauer et al v. O'Donnell,[11] the court had held that the exclusive right granted to a patentee to "make, use, and vend the invention or discovery"[12] does not include the right, by notice, to limit the price at which the patented articles may be resold at retail by persons who have purchased them from jobbers who have paid the full price for them asked by the patentee or his agents. The court pointed out that in Dr. Miles Medical Co. v. John D. Park & Sons[13] it had been held that an attempt to fix the price of an article of general use was against public policy and therefore void; and that the same had been held in Bobbs-Merrill Co. v. Straus[14] with reference to the limiting of the retail prices of copyrighted books, that is, that the practice, being opposed to public policy, was not rendered legal by reason of the copyright held by the original seller.

In Virtue v. Creamery Package Manufacturing Co.[15] it was held that the Sherman Act was not violated by a contract according to which parties manufacturing various patented dairy supplies, and controlling ninety per cent thereof, constituted another corporation their exclusive sales agent and fixed the list prices of its products. The specific facts of this case were so complicated that even a summary of them is not here practicable.

In United States v. Winslow,[16] however, it was held that a combination into a single company of several companies, each manufacturing a different non-competing group of patented machines collectively used for the making of shoes, was not forbidden by the Sherman Act. The new company thus formed made at its own factory all the machines which previously had been made in different places, and directly, or indirectly through subordinate companies, carried on all the commerce which had formerly been carried on by the independent or constituent companies. This commerce consisted in the licensing of the machines to shoe manufacturers on the condition that these manufacturers should use only the machines furnished by the defendants. The court said: "On the face of it the combination was simply an effort after greater efficiency."

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[10] 243 U. S. 502.

[11] 229 U. S. 1.

[12] U. S. Rev. Stat., § 4884.

[13] 220 U. S. 373.

[14] 210 U. S. 339.

[15] 227 U. S. 8.

[16] 227 U. S. 202.

In Bauer & Cie v. O'Donnell,[17] it was held that the patent right to "make, use, and vend" the invention or discovery did not include the right to limit by notice the price at which the patented article might be resold at retail by a purchaser from jobbers who had paid to the patentee's agent the full price asked for the article. The mere attaching to the article of a notice stating that the article was licensed for sale at a specified price could not, the court declared, convert an otherwise apparently unqualified sale into a mere "license to use" the invention.

In Straus v. American Publishers' Association [18] a similar ruling was applied to copyrights.

In Straus v. Victor Talking Machine Co.[19] was involved a so-called "License Notice" attached to patented talking machines sold by the Victor Company according to which it was declared, *inter alia*, that the machine was to be used only with sound records, sound boxes, and needles manufactured by the company; that only the right to use the machines "for demonstration purposes" was granted to wholesale dealers who might assign a like right to the public or to regularly licensed Victor dealers at the dealers' regular discount royalty, and that the dealers might convey the right to use the machines only when a "royalty" of not less than $200 was paid for each, and upon the "consideration" that all the conditions of the "license" would be observed; and that the title to the machine should remain in the Victor Company. The court, in a brief opinion, declared that this "License Notice" was plainly a device unlawfully to extend the scope of the patents involved at the expense of the general public—a device which had been in substance dealt with and held illegal in the Dr. Miles Medical Company and Bauer cases.

The foregoing cases were decided prior to the enactment of the Clayton Anti-Trust Act of 1914. By that act (Section 3) its prohibitions regarding "tying" contracts, etc., were expressly made applicable to goods, wares, machinery, supplies and other commodities "whether patented or unpatented."

In Boston Store of Chicago v. American Graphophone Co.,[19a] and United Shoe Machinery Co. v. United States [19b] the doctrine was reaffirmed that the monopoly given inventors by the patent laws does not fall within the Anti-Trust Act, but that this monopoly right does not enable the patentee, after parting with the title to patented articles, to retain control of their sale or other incidents of title.

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[17] 229 U. S. 1.

[18] 231 U. S. 222.

[19] 243 U. S. 490.

[19a] 246 U. S. 8.

[19b] 258 U. S. 451.

In United States v. United Shoe Machinery Co.[20] it was held that, in actions for violation of the Sherman Act, it was no defence to show that a combination in restraint of trade left a limited field open to competition. However, it was held that the union into one corporation of a number of other corporations which had previously been engaged in the manufacture of non-competing machines used successively in a manufacturing business, was not a violation of the act. The court pointed out that the various acquisitions of properties and rights by the defendant company had not been coincident in time, or been parts of the same transaction, but had been scattered through a period of years and varied from one another and had no apparent *inter se* connection. The defendant company, the court found, was, indeed, a large one, but this was the result as well as the cause of efficiency, and its powers had not been oppressively used. However, the court in its decree enjoined the continuance of certain practices of the defendant company.[20]

In Federal Trade Commission v. Beech-Nut Packing Co.[21] the Federal Trade Commission had condemned, as an unfair method of competition, the requirement by the Beech-Nut Company that purchasers of its products should resell such products only at standard prices, and also the company's refusal to sell to customers or dealers who would not agree so to do. The court below had held that the case was governed by the ruling in United States v. Colgate & Co.[22] and, therefore, had declared that the Federal Trade Commission had exceeded its power in making the order appealed from. The Supreme Court, however, pointed to the fact that, in the Colgate case, the only act charged amounted to the exercise of the right of a trader or manufacturer engaged in private business to use his own discretion as to those with whom he would deal, and that, as thus interpreted, the Sherman Act had not been violated thereby. Reference was also made to United States v. Schrader's Son,[23] and Frey & Son v. Cudahy Packing Co.[24] in which the holding in the Colgate case had been construed. Said the court: "By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts, combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." In the instant case the court found that the Beech-Nut Company had gone beyond this simple refusal to sell to persons who would not resell at stated prices.

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[20] 247 U. S. 32.

[21] 257 U. S. 441.

[22] 250 U. S. 300.

[23] 252 U. S. 85.

[24] 256 U. S. 208.

In United States v. General Electric Co.[25] it was charged that the system adopted by the defendant company of disposing of the incandescent electric lights manufactured by it, under patents owned by it, amounted to an attempt upon its part to control the resale price of these lights. The court found, however, that the Westinghouse Lamp Company, and the more than twenty thousand dealers throughout the country handling these lights, were in fact agents of the General Electric, and that, therefore, the sales made by these agents were original sales and not resales.

§ 347. Federal Trade Commission Cases.

A number of cases have reached the Supreme Court on writs of certiorari from rulings of the lower courts upon orders issued by the Federal Trade Commission. These, of course, have dealt with the question of unfair trade or unfair competition as distinguished from the monopolizing or restraining of trade or of contracts or combinations so to do.

In Federal Trade Commission v. Gratz [26] it was held that there was no basis for an order by the Commission, requiring a company selling cotton ties and bagging to desist from refusing to sell ties unless the purchaser would agree to buy from it a corresponding amount of bagging as well, there being no intimation that the company had a monopoly of either ties or bagging or the ability or intention to secure one, and no averment that the public was suffering any injury from the practice or that competition had a reasonable ground for complaint. The court pointed out that the words "unfair method of competition," not being defined by the statute, it was within the province of the court and not of the Commission ultimately to determine their exact meaning.

In Federal Trade Commission v. Winsted Hosiery Co.[27] the Commission was upheld as to an order by it directed against the use by a manufacturer of brands or labels describing his product as "natural merino," "gray wool," "natural wool," "natural worsted" or "Australian wool" when, in fact, his product was not composed wholly of wool. This practice, it was declared, constituted an unfair method of competition as against other concerns which truthfully marketed their goods. The fact that misrepresentation and misdescription had become so common in the trade that most dealers did not accept labels at their full face value was declared immaterial.

In Federal Trade Commission v. Curtis Publishing Co.[28] it was again affirmed that the ultimate decision as to what constitutes unfair methods of competition is vested in the courts rather than in the Commission, and that, in exercising this authority, the courts have the power to examine the whole record and evidence in the case. In this case it was held that a contract by which a publisher agreed, *inter alia*, to consign to an agent a certain number of copies of its publication, and the agent agreed to supply boys and dealers with the copies so received at specified rates and to use reasonable efforts to promote sales, and that, without the consent of the publisher, he would not sell in the territory of other agents, or act as agent for, or supply at wholesale rates the periodicals of other publishers, was a contract of agency and not of sale, and, therefore, not within the operation of the Clayton Anti-Trust Act.

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[25] 272 U. S. 476.

[26] 253 U. S. 421.

[27] 258 U. S. 483.

[28] 260 U. S. 568.

In Federal Trade Commission v. Sinclair Refining Co.[29] it was held that the furnishing by oil refiners to dealers of tanks and pumps without charge and at less than cost for hauling their oil on condition that, if the tanks or pumps should be used for the product of competitors, the right to use such equipment should cease, was not an unfair method of competition.

In Federal Trade Commission v. Raymond Bros.-Clark Co.[30] it was held that a wholesaler's refusal to purchase from a manufacturer unless he would discontinue selling to a competitor was not an unfair method of competition, the right of the individual to use a free discretion as to whom he would deal with being reaffirmed, no elements of monopoly or of other forms of oppression being disclosed. A different case would be presented, said the court, if the company against which the Federal Trade Commission had issued the order, should combine or agree with other wholesale dealers that none of them would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers.

In Federal Trade Commission v. Klesner [31] it was pointed out by the court that the Commission has not been established in order that an administrative remedy for private wrongs may exist: that its purpose is to subserve the general or public interest, and, therefore, that, while a private party may bring a trade practice to the attention of the Commission, it lies within the judgment of that body whether proceedings against the alleged wrongdoer shall be instituted. In its opinion the court explained that, upon the one hand, a public interest warranting action by the Commission may exist even though no private right may be violated, and, on the other hand, the mere fact that a private right may be violated does not establish the existence of such a public interest. As regards the power of the courts to review determinations of the Commission it was pointed out that while the determinations of fact of the Commission are, by the statute, to be deemed conclusive, if supported by evidence, its preliminary determination that, in a given case, the institution of proceedings will be in the public interest, will, ordinarily, but not necessarily, be accepted by the courts. "The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without inquiry into the merits, dismiss the suit."

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[29] 261 U. S. 463.

[30] 263 U. S. 565.

[31] 280 U. S. 19.

In International Shoe Co. v. Federal Trade Commission [32] the court, overruling the Federal Trade Commission, held that Section 7 of the Clayton Act was not violated by the mere acquisition by one corporation of the stock of a competing company, where the result was that competition, though lessened to some extent, was not decreased to such a degree as, in the court's opinion, injuriously to affect the public interest.

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[32] 280 U. S. 291.

CHAPTER XLII

INTERSTATE COMMERCE AND LABOR

§ 348. Labor Provisions of the Clayton Act.

It is elsewhere pointed out that, in the Danbury Hatters case,[1] the Sherman Act of 1890 was held to apply to combinations of, or conspiracies between, laborers and their associations in restraint of interstate trade. This decision, in 1908, was felt as a considerable blow by trade-unionists who feared that the very existence of trade-unions as legal organizations was thereby jeopardized.[2] A campaign was, therefore, at once begun not only to place the unions upon a firmer legal basis, at least so far as Federal law was concerned, but to exempt them from what the trade-unionists conceived to be an undue control by the law and by the courts. This campaign led, in 1914, to the inclusion in the Clayton Act[2] of provisions relating to the issuance of injunctions in labor disputes (which will be presently considered) and the following declaration regarding the status of labor, agricultural and horticultural organizations:

"Section 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The foregoing declaration was received with great acclaim by the labor organizations, but their satisfaction was scarcely justified, as decisions of the Supreme Court were soon to show. Indeed, a critical scrutiny of the section of the act, as above quoted, shows that its language was so carefully guarded as to give it no more than a declaratory force, that is, as stating existing law rather than as creating new law. The title of the act speaks only of "unlawful" restraints, and Section 6 declares that the anti-trust laws are not to be construed as forbidding or restraining the individual members of the organizations from "lawfully" carrying out the "legitimate" objects thereof. The most that can be said, therefore, of this section, in an affirmative way, is that it makes it certain that trade-unions are not, *per se*, that is, apart from what they are or what their members may do, to be deemed illegal as being combinations or conspiracies in restraint of trade. But, whatever may have been the early common law upon the subject, it is clear that, at the time the Clayton Act was passed, the courts had come definitely to the view that, apart from a statutory declaration to a contrary effect, trade-unions or other ordinary labor organizations were not to be deemed illegal associations or combinations.

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[1] Loewe v. Lawlor (208 U. S. 274).

[2] See, for example, Mr. Gomper's statement in 21 *Federationist*, 35.

[3] 38 Stat. at L. 730.

As to the declaration of Section 6 that the labor of human beings was not to be deemed a commodity or article of commerce, all that can be said is that it has no meaning as a legal proposition. No court has ever held that labor is either a commodity or an article of commerce, and it is difficult to imagine how the courts could find it necessary either to deny or to affirm such a proposition.

It would appear, then, that, notwithstanding the Clayton Act, the activities of trade-unions can come within the prohibition of the Anti-Trust Act in so far as they have as their purpose, or effect, the monopolizing of, or the placing of restraints upon, interstate or foreign commerce. And the same is true as to the specific prohibitions contained in the Clayton Act itself. That act does, however, place important limitations upon the power of the courts to intervene in labor disputes by way of injunctive relief. The provisions of the Clayton Act with regard to this matter are as follows:

Section 16 provides expressly that injunctive relief may be granted by courts of competent jurisdiction in order to prevent irreparable threatened loss or damage by violations of the Federal anti-trust laws, with the proviso that only the United States is to be entitled to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Interstate Commerce Act of 1887 in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission. The following sections of the act, however, the text of which is given in the footnote,[4] specify the conditions and circumstances under which injunctions may be issued.

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[4] Sec. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.

Sec. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document,

§ 349. Anti-Trust Act Applied to Labor Associations.

The fact that the labor or trade-unions had, by the Clayton Act, gained no exemption from the operation of the Anti-Trust Acts, including the Clayton Act, has been made manifest in a number of important cases which have served to show the character of the acts of trade-

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the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing, and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Sec. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sec. 22. In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, unions which the Supreme Court deems lawful and those which it deems unlawful.

It will be remembered that, in Adair v. United States,[5] the court had held unconstitutional the act of Congress which had prohibited interstate carriers from discharging an employee because of his membership in a labor union. In Coppage v. Kansas [6] the court held invalid, as a denial of due process of law, a State statute which forbade an employer to require of employees or of persons seeking employment an agreement not to become or remain a member of a trade-union. These decisions, so far as they went, were favorable to the interests of trade-unions. However, in Lawlor v. Loewe,[7] the court held that, irrespective of compulsion or agreement, the circulation by a union of a list of "unfair dealers" the manifest intention of which circulation was to dissuade possible customers from dealing with the dealers upon the list, combined with a purpose to boycott such dealers, was within the prohibition of the act of 1890.

In Hitchman Coal & Coke Co. v. Mitchell,[8] the common law with reference to the determination of what may be deemed lawful or unlawful acts upon the part of trade-unions was again directed against the unions. In this case the officers of a union were restrained by an injunction from obtaining from employees secret promises to join a union although they had agreed with their employers to leave their employment in case they should join the union. This case did not involve the Federal Anti-Trust Act, but arose under the common law of the State of West Virginia. The case is, however, significant as indicating the attitude of the court as to what conduct is lawful upon the part of trade-unions. Also, in Eagle Glass and Manufacturing Co. v. Rowe [9] decided on the same day as the Hitchman case, the court held that the fact that employees may lawfully strike of their own volition does not justify the members of a trade-union to which such employees do not belong in instigating a strike upon their part, and that an injunction will properly lie to restrain the officers and members of the union from such instigation.

In Paine Lumber Co. v. Neal[10] it was held that, under Section 4 of the act of 1890, the remedy of injunction to prevent damage arising out of a violation of the act could not be availed of by the private parties injured, but could be obtained only by the United States Government.

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process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

[5] 208 U. S. 161.

[6] 236 U. S. 1.

[7] 235 U. S. 522.

[8] 245 U. S. 229.

[9] 245 U. S. 275.

[10] 244 U. S. 459.

In Duplex Printing Press Co. v. Deering et al.[11] the court found that the defendants had engaged in what amounted to a secondary boycott directed against the plaintiff company and with a resulting illegal interference with its interstate trade. A secondary boycott the court defined to be "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ['primary boycott'], but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

This distinction between a primary and a secondary boycott the court declared to be material in determining the proper construction of the Clayton Act. "But," the court added, "in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect, irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes."[12]

After referring to, and quoting from its opinions in Loewe v. Lawlor,[13] and Lawlor v. Loewe,[14] the court said: "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition [of the Anti-Trust Act] as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

In this connection it is furthermore to be observed that, unlike what was true in the case of Hitchman Coal and Coke Co. v. Mitchell,[15] there was no charge that the defendants had induced the employees of the complainant to violate agreements between themselves and him.

In United Leather Workers Int. Union v. Herkert & Meisel Trunk Co.[16] the court, after an elaborate review of the cases, held that a strike against manufacturers intended by the strikers to prevent, and, in fact, preventing, continued manufacture, was not brought within the operation of the Federal Anti-Trust Acts by reason of the fact that the commodities to be manufactured were to be shipped in interstate commerce. The Federal control would become, and could constitutionally become, operative only if the strikers should interfere, or seek to interfere, with the free transportation, delivery or sale of such commodities in other States.

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[11] 254 U. S. 443, 466, 468.

[12] See also the opinion in this case as to whether the injunction was forbidden by Section 20 of the Clayton Act. See also American Steel Foundries v. Tri-City Central Trades Council (257 U. S. 184).

[13] 208 U. S. 274.

[14] 235 U. S. 522.

[15] 245 U. S. 229.

[16] 265 U. S. 457.

The trade-unions were by no means satisfied with the results of the decisions which have been summarized, but they were still more disturbed when, by the decision of the Supreme Court in the case of United Mine Workers of America v. Coronado Coal Co. in 1922,[16a] it was held that trade-unions, in view of the various acts of Congress recognizing their existence, were, though unincorporated organizations, legal entities that might be held responsible for their acts, and their funds subjected to execution upon judgments obtained in suits for torts committed by them in connection with illegal strikes engineered by them.

In Michaelson v. United States *ex rel.* C., St. P., M. & R. Co.[17] the court held that the mandatory provision of the Clayton Act with regard to trial by jury upon demand in contempt proceedings was constitutional in that the act related exclusively to proceedings for criminal contempt which, unlike proceedings for civil contempt, are independent proceedings and no part of the original cause in which they may have arisen. Were the statute construed to refer to proceedings for civil contempt, said the court, a more serious constitutional question would arise, namely, as to the right of Congress to control the courts in the exercise of a power inherent in them.[18]

By the decision of the court in Bedford Cut Stone Co. v. Journeyman Stone Cutters' Assn.[19] the trade-unions received what they have considered to be another serious set-back to their legal rights. In that case it was held that a general order of a stone cutters' union directing its members not to work on stone which had been partly cut by non-union labor and which had been transported in interstate commerce, constituted an undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act. That this prohibition operated upon the stone only after its physical interstate transportation had ended was held immaterial, since, as the court held, the interference had for its primary aim restraint of the interstate sale and shipment of the stone, and such restraint was the necessary consequence. The fact that the ultimate end aimed at by the Stone Cutters' Association was one which it was legal for it to seek, would not, said the court, justify, as a means to that end, the placing of such restraint upon interstate commerce.

[16a] 259 U. S. 344.

[17] 266 U. S. 42.

[18] For a further discussion of this point, see *post*, § 728.

[19] 274 U. S. 37.

CHAPTER XLIII

PACKERS AND STOCKYARDS ACT AND OTHER FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE

§ 350. Packers and Stockyards Act.

In the so-called Beef Trust case,[1] decided in 1905, it was declared that "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated." [2]

By Section 15, paragraph 5 of the Interstate Commerce Act, as amended June 29, 1906, June 18, 1910, and February 28, 1920, it was provided that:

"Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The [Interstate Commerce] Commission may prescribe or approve just and reasonable rules governing each of such excepted services."

By the Packers and Stockyards Act of August 15, 1921 [3] Congress has provided for the supervision by Federal authority of the business of commission men and livestock dealers in the great stockyards of the country. The enforcement of the act is placed in the hands of the Secretary of Agriculture, and the regulations prescribed closely resemble those provided by the Anti-Trust Acts for other persons engaged in interstate commerce. In Stafford v. Wallace [4] the constitutionality of the act as a regulation of interstate commerce, was upheld.

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[1] Swift & Co. v. United States (196 U. S. 375, 398).

[2] See also United States v. Union Stock Yard & Transit Co. (226 U. S. 286).

[3] 42 Stat. at L. 159.

§ 351. "Future Trading" and Interstate Commerce.

In Chicago Board of Trade v. Christie G. & S. Co.[5] it was held that contracts with telegraph companies by a Board of Trade limiting the communication of quotations of prices on sales of grain and provisions for future delivery, collected by the Board, does not amount to, or attempt the establishment of, a monopoly, and are not contracts in restraint of trade either at common law or under the Federal Anti-Trust Acts.

In United States v. New York Coffee and Sugar Exchange,[6] in line with the Christie case, it was held that sales of sugar for future delivery under contracts providing for actual delivery on an exchange, and, in connection therewith, of a clearing association for offsetting purchases against sales, was not a conspiracy on the part of the exchange and clearing association to restrain trade in violation of the Anti-Trust Act, in the absence of evidence that the exchange and the clearing house had produced, or had attempted to produce, a disturbance of the market, although other persons might have conspired to use the operations of the exchange and the clearing association to cause a rise in the price of sugar.

However in United States v. Patten,[7] it was held that a conspiracy to effect a "corner" in the available supply of a staple commodity like cotton, which is normally the subject of interstate commerce, and to accomplish this by means of purchases for future delivery, coupled with the withholding from sale for the time being of such amounts purchased and thereby enhancing the price of the commodity to all buyers, was a conspiracy within the terms of the Anti-Trust Act of 1890.

§ 352. Cotton Futures Act.

By act of August 18, 1914,[8] Congress sought to regulate, by means of an excise tax, dealings in sales of cotton for future delivery at Cotton Exchanges. This act was replaced by the "Cotton Futures Act" which constituted part of the Agricultural Appropriation Act of August 11, 1916.[9]

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[4] 258 U. S. 495. See also Tagg Bros. & Moorhead v. United States (decided February 24, 1930).

[5] 198 U. S. 236.

[6] 263 U. S. 611.

[7] 226 U. S. 525.

[8] 38 Stat. at L. 693.

[9] 39 Stat. at L. 476. Amended March 4, 1919, 40 Stat. at L. 1351.

§ 353. Grain Futures Trading Act.

By act of August 24, 1921,[10] a tax of 20 cents a bushel was imposed on all contracts for the sale of grain for future delivery, but there were excepted from its application sales on boards of trade, designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain prescribed conditions and requirements. The constitutional validity of this act was contested in Hill v. Wallace [11] upon the ground that, though sought to be supported as a regulation of interstate and foreign commerce, it had no direct relation thereto. This contention the Supreme Court upheld, and the law declared void upon the same ground that, in Bailey v. Drexel Furniture Co.,[12] the Child Labor Tax Law had been held invalid.

§ 354. Grain Futures Act of 1922.

On September 21, 1922 [13] Congress enacted a new Grain Futures Act. This statute was avowedly enacted by Congress as an exercise of its power to regulate interstate commerce, and its purpose declared to be the prevention of obstructions and burdens upon that commerce, and, to that end, imposed regulations upon the buying and selling of grain on boards of trade or through other exchanges or associations. In Board of Trade of Chicago v. Olsen,[14] this law was distinguished from the one held void in Hill v. Wallace,[15] and its constitutional validity, as a regulation of interstate commerce, upheld. The former law had made no pretence of being in regulation of, or limited in its application to, interstate commerce. The present act, the court said, "purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that, by manipulation, they have become a constantly recurring burden and obstruction to that commerce. . . . It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfilment of future contracts, from the current of stock shipments declared to be interstate commerce in Stafford v. Wallace, 258 U. S. 495."

§ 355. Air Commerce Act of 1926.

During recent years a considerable number of the States of the Union have enacted laws in regulation of the use of the air above their several areas by aircraft. It was not until May 20, 1926, however, that a general Federal law was passed.[16] Various constitutional sources for Federal authority in the premises were, at various times, discussed, and, among them the maritime and admiralty jurisdiction,[17] but the measure finally enacted was based upon the power of Congress to regulate interstate and foreign commerce.[18]

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[10] 42 Stat. at L. 187.

[11] 259 U. S. 44.

[12] 259 U. S. 20.

[13] 42 Stat. at L. 998.

[14] 262 U. S. 1, 32, 34.

[15] 259 U. S. 44.

[16] 44 Stat. at L. 568. There had been earlier laws relating to naval and military and other governmental aircraft.

§ 356. Radio Act of 1927.

By the Radio Act of February 23, 1927,[19] Congress has made elaborate and detailed provision regarding the sending of interstate and foreign radio communications. By Section 1, the act is declared to have for its purpose, "to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited portions of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."

For the enforcement and administration of the act a Federal Radio Commission was created.

It is provided that the Commission shall revoke the license of any party certified to it by the Interstate Commerce Commission as having been guilty of making unjust or discriminatory charges or services, or having failed to provide reasonable facilities for the transmission of radio communications.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade are declared applicable to the manufacture and sale of, and to trade in, radio apparatus and devices entering into or affecting interstate or foreign trade or to interstate or foreign radio communications.

The act contains many other specific provisions which it is not feasible here to summarize.

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[17] Of course, under its military powers, Congress can exercise and has exercised, control of aviation in its military and naval aspects. Aviation in its international aspects is subject to Federal regulation under the Treaty power, and the United States has signed the International Air Navigation Convention of October 13, 1919, but, for some reason or other, this Convention has not been submitted by the President to the Senate for its approval, and, therefore, the Convention is not in force, at least so far as the United States is concerned.

[18] A good discussion of this act by Mr. Frederic P. Lee, Legislative Counsel to the United States Senate, is to be found in the *American Bar Association Journal*, June, 1926. *Cf.* Smith v. New England Aircraft Co. (170 N. E. [Mass.] 385).

[19] 44 Stat. at L. 1162. See also Act of December 18, 1929.

CHAPTER XLIV

NAVIGABLE WATERS AND THE COMMERCE POWER

§ 357. Federal Control of Navigable Waters under the Commerce Power. In a later chapter will be considered the Federal powers, both judicial and legislative, which flow from the provision of Section 2, Article III of the Constitution, which provides that the Federal judicial power shall extend "to all cases of admiralty and maritime jurisdiction." It will there appear that, under this grant of authority, the National Government has been construed to have a general authority over all acts directly connected with or occurring upon the navigable waters of the United States. These navigable waters have been construed to be all waters, whether tidal or not, and whether located wholly within a single State or not, which are navigable in fact, or are susceptible of being so used in themselves or as connecting links, as highways over which trade and travel may be conducted between the States or with foreign nations. Navigability has thus been accepted as the essential test of Federal admiralty jurisdiction. It is thus apparent that the Federal authority thus obtained is a more comprehensive one, territorially or spatially speaking, than that derived from the Commerce Clause.

It will also be seen, when dealing with the matter of Federal admiralty and maritime jurisdiction, that it is established that such jurisdiction carries with it a full legislative power upon the part of Congress to provide the law to be applied. This legislative power, as declared in *Re* Garnet,[1] "is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

It has already appeared in the sections dealing with the definition of interstate and foreign commerce, that commerce includes navigation as one of its essential elements. It thus results that, with reference to the regulation of navigable waters, Congress draws its legislative power from a double source:—from Section 2 of Article III of the Constitution vesting admiralty and maritime jurisdiction in the Federal Government, and from the Commerce Clause. In the one case, however, the authority is rather, though not exclusively, to fix the law governing transactions with reference to or upon navigable waters; in the other, to determine the conditions under which the waters shall be navigated and to protect or to increase their navigability. The line between the two powers is, however, by no means clear and thus much of the legislation of Congress with reference to the navigable waters of the United States has been constitutionally defensible either as falling within the Federal authority in matters of admiralty and maritime jurisdiction or as included within the power of Congress to regulate interstate and foreign commerce. In certain cases, moreover, still other sources of Federal constitutional authority with reference to rivers, streams and lakes have appeared. This has been the case when Congress has dealt with waters lying within, or flowing through, the public lands of the United States, and when the matter of irrigating these lands has been involved; or when Congress has dealt with waters lying within the Territories; or when the war powers of Congress have been involved, or the field of international relations has been entered. In the present sections, however, we shall deal with navigable waters only in so far as the commerce power is concerned.

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[1] 141 U. S. 1.

That navigation is included within the commerce subject to Federal regulation was fixed once for all in Gibbons v. Ogden.[2] In Gilman v. Philadelphia,[3] the extent of the power of Congress to legislate under the Commerce Clause with reference to navigation is thus described: "The power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a State other than those in which they lie. For this purpose, they are the public property of the Nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

Although, as will be seen from the quotation that has just been made, the court said that the navigable waters may be regarded as "the public property of the Nation" when the matter of maintaining their navigability is concerned, there has never been any question that, except when situated within the public lands of the United States, the Federal Government has no proprietary rights in them; nor, indeed, does its sovereignty extend over them to the exclusion of that of the States in which they may be situated. Thus, aside from the matter of maintaining or promoting their navigability and of regulating navigation thereon, the National Government has no constitutional authority to exercise municipal jurisdiction over them, or to claim a property interest in their beds or banks, or to assert riparian rights in their waters, except, of course, in so far as the United States may itself happen to be the owner of lands through which the waters may flow. In other words, the United States may exercise an authority over these waters only in so far as interstate or foreign commerce, including the maintenance and promotion of their navigability, is concerned.

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[2] 9 Wh. 1.

[3] 3 Wall. 713.

This proposition may be said to have been fully settled, if, indeed, it were previously in doubt, by the holding of the court in Kansas v. Colorado.[4]

§ 358. Navigable Waters Defined.

In the case of The Daniel Ball,[5] the court defined the public navigable waters of the United States in the following terms: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." [6]

Artificial waterways, such as canals, have also been judicially held to come within the definition of public navigable waters of the United States if they satisfy the other conditions as above enumerated.[7]

Whether or not a stream or other water is a navigable water of the United States would seem to be a question for final Federal determination.[8]

What is to be deemed an obstruction to navigation is a matter for determination by Congress. In United States v. Chandler-Dunbar Water Power Co.[9] the court said: "So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstruction and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control."

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[4] 206 U. S. 46. See also International Bridge Co. v. New York (254 U. S. 126); and Port of Seattle v. Oregon & Washington R. Co. (255 U. S. 56).

[5] 10 Wall. 557.

[6] See also Economy Light and Power Co. v. United States (256 U. S. 113).

[7] See *Ex parte* Boyer (109 U. S. 629); and The Robert W. Parsons (191 U. S. 17).

[8] A broad statutory definition of what shall be deemed to constitute the navigable waters of the United States is to be found in the Federal Water Power Act of 1920.

[9] 229 U. S. 53.

§ 359. Federal Legislation Concerning Navigable Waters.

By various acts Congress has from time to time provided for the protection against interruption of navigable waters, as, for example, for the removal of obstructions to navigation, for the alteration of bridges over navigable streams, as directed by the Secretary of War, requiring that the permission of the Secretary of War shall be obtained for the building of bridges over, and dams or other strurtures in the channels of navigable waters, or the alteration of such channels, etc. In fact, Congress has forbidden every obstruction in navigable waters unless express affirmative Federal authorization therefore has been given.[10]

§ 360. Federal Water Power Act of 1920.

Directly connected with the authority of the United States to protect and improve the navigability of waters of the United States is the question whether, as incidental thereto, the United States may develop, or authorize the development, of water power, and derive a revenue by the sale or lease of the same to private parties. These questions have been sharply raised by the Federal Water Power Act of June 10, 1920.[11]

As regards the constitutional points raised by this act, it may be said that it is reasonably clear that, except in cases in which the United States itself has riparian rights by reason of being the proprietor of the lands through which the waters flow, or has gained such rights by grant from a State, Congress has no authority from the Commerce Clause or any other clause of the Constitution to construct plants on streams, whether navigable or not, for the primary purpose of collecting and distributing water for the purpose of providing mechanical power or for furnishing water for irrigation purposes. The doctrine of Kansas v. Colorado[12] would seem to establish this proposition. The more disputed question, however, is whether the United States, as incidental to the improvement of the navigation of streams, may develop water power which it may itself use or from which it may derive a revenue by lease to other parties.

A case which comes the nearest to supporting an affirmative answer to this question is that of United States v. Chandler-Dunbar Water Power Co.[13] This case is also important as determining that the proprietary right of holders of fast land upon the shores of navigable waters to the bed of such waters, may be subordinated to the right of the United States to maintain or improve the navigability of such waters. As to such right the court said: "It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. . . . All means having some positive relation to the end in view [navigation] which are not forbidden by some other provision of the constitution are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation."

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[10] For an elaborate account of this legislation see the monograph of J. G. Kerwin, *Federal Water Power Legislation*, published in 1926 by the Columbia University Press.

[11] 41 Stat. at L. 1063.

[12] 206 U. S. 46.

In this case, with respect to the constitutionality of Section 12 of the act of 1909 which had authorized the Secretary of War to lease, upon terms agreed upon, any excess of water which might result from the conservation of the flow of the river and from the works which the Government might construct, the court said: "If the primary purpose is legitimate [i. e. for the improvement of navigation], we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments."

As yet the constitutionality of the Water Power Act has not been passed upon by the Supreme Court.

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[13] 229 U. S. 53, 62, 73.

CHAPTER XLV

EXCLUSION OF PERSONS AND COMMODITIES FROM INTERSTATE AND FOREIGN COMMERCE BY THE FEDERAL GOVERNMENT

In exercise of its power to regulate interstate and foreign commerce, Congress has, in a considerable number of instances, excluded certain persons and commodities from transportation in such commerce. In this chapter this legislation, together with the questions of constitutional competence in connection therewith, will be discussed. It will be found that the crucial constitutional question is as to whether the regulatory power of Congress in the premises is broad enough to warrant that body in exercising the right of exclusion in order to obtain results which have no real relation to the safety or convenience of interstate and foreign transportation;—in other words, whether the power is an arbitrary one, except as the matter of due process of law may be involved.

§ 361. Commerce and Postal Powers Distinguished as to Right of Exclusion.

The cases in which it has been held that the Federal Government has a full discretionary power to exclude articles from the mails cannot be used to support, by analogy, a similar power over interstate commerce. For, by the Constitution, Congress is given the exclusive power to establish post-offices or post-roads. The maintenance of a postal service is thus a subject over which the States have no authority. Interstate commerce is, however, a matter which is not established by the Federal Government. Its regulation, and not its creation, by the Federal Government, is provided for by the Constitution. The distinction between the powers of the United States with reference to interstate commerce and those arising out of its power to establish post-offices and post-roads is recognized in the leading case of *Ex parte* Jackson[1] in which the court said: "We do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter in the sense in which those terms were used when the Constitution was adopted—consisting of letters and of newspapers and pamphlets when not sent as merchandise; but further than this, its power of prohibition cannot extend."

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[1] 96 U. S. 727.

§ 362. The Power to Exclude from Foreign Commerce Distinguished from the Power to Exclude from Interstate Commerce.

Though, as is elsewhere pointed out, there have been statements by the Supreme Court of the United States that the control which Congress may exercise over interstate commerce is as plenary in character as that which it may exercise over foreign commerce, the fact is that these statements are true only in so far as they relate to the grant of legislative authority contained in the Commerce Clause, for, as regards foreign commerce, the Federal Government has extensive powers of regulation derived from the fact that it has plenary and exclusive control of the foreign relations of the United States, that is, of all subjects which, according to the usage of nations, are treated as matters of international significance, or which, whatever may have been the usage of States, are, in fact, of international concern. There is, of course, no dispute that the matter of foreign trade, whether by way of exports or imports of commodities, and the passing of persons from one sovereign territorial jurisdiction to another sovereign territorial jurisdiction, whether by way of emigration or of immigration, are matters the regulation of which come within the sphere of Foreign Relations. Hence, it results that the Federal Government has a control of foreign commerce, both of persons and of commodities, independently of the Commerce Clause, and that, in the exercise of that power, thus independently possessed, the United States, whether through the treaty or the legislative power, may, according to its own conception of what good public policy dictates, exclude persons and commodities from the commerce of the United States with foreign Powers. It is clear, then, that, from the right of Congress to exclude articles or persons from foreign commerce, one cannot argue a similar power with reference to interstate commerce.[2]

§ 363. Exclusion from Interstate Commerce.

That the power to regulate includes, in certain cases at least, the right of Congress to exclude certain classes of persons or of commodities from interstate commerce, has never been doubted.

Thus, the right to exclude from interstate commerce commodities like explosives, which are dangerous to export, unless packed in certain specified ways; or of infected goods which may contaminate other goods, is undoubted. Such measures clearly are of a reasonable regulative character, and relate directly to the carrying on of interstate transportation. They are, in this respect, similar to the laws requiring the railroads to employ safety devices and to adopt various operative methods with a view to the prevention of accidents.[3]

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[2] *Cf.* Buttfield v. Stranahan (192 U. S. 470).

§ 364. Intoxicating Liquors and Interstate Commerce.

There has been considerable Federal legislation, based upon the Commerce Clause, some of which has involved the exclusion, under certain circumstances, of intoxicating liquors. Most of this legislation has now been superseded by the acts of Congress in enforcement of the Eighteenth Amendment.

Although these cases are still valuable because of the constitutionality declared in them by the Supreme Court with reference to the forms of regulation of interstate commerce which Congress may constitutionally employ, and also as to what is to be construed as an unconstitutional interference with interstate commerce by the States, considerations of space prevent their discussion. The more important of these cases are referred to in the footnote, as are also certain statutes enacted by Congress in order to enable the States to render more effective within their own borders their several liquor laws.[4]

§ 365. Lottery Tickets.

By act of March 2, 1895,[5] Congress provided that "any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement, of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable," etc.

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[3] As to infected articles see the Cattle Quarantine Acts of February 2, 1903 (32 Stat. L. 791) and March 3, 1905 (33 Stat. at L. 1264). As to the transportation of different kinds of virus, or serums and toxins, see the act of March 4, 1913 (37 Stat. at L. 828). As to unmarked nursery stock, see the act of August 20, 1912 (37 Stat. at L. 315). As to uninspected meats, see the act of June 30, 1906 (34 Stat. at L. 674). As to dangerous caustic or corrosive substances, see the act of March 4, 1927 (44 Stat. at L. 1406).

The foregoing acts are in the nature of quarantine acts and their main purpose is undoubtedly that of protecting the peoples of the communities to which the articles are to be transported. There is, however, present a sufficient element of danger of infecting other goods which are being transported to make it possible to regard these measures as relating to the safety of interstate transportation itself.

[4] Mugler v. Kansas (123 U. S. 623); License Cases (6 How. 504); Bowman v. Railroad (125 U. S. 465); *Re* Rahrer (140 U. S. 545); Scott v. Donald (165 U. S. 58); Rhodes v. Iowa (170 U. S. 412); Vance v. Vandercook (170 U. S. 438); Adams Express Co. v. Iowa (196 U. S. 147); Pabst Brewing Co. v. Crenshaw (198 U. S. 17); Heymann v. Southern R. Co. (203 U. S, 270); Delamater v. South Dakota (205 U. S. 93); Adams Express Co. v. Kentucky (206 U. S. 129); Louisville and Nashville R. Co. v. F. W. Cook Brewing Co. (223 U. S. 70); Adams Express Co. v. Kentucky (238 U. S. 190); Clark Distilling Co. v. Western Maryland R. Co. (242 U. S. 311); United States v. Hill (248 U. S. 420); The Wilson Act (26 Stat. at L. 313); the Webb-Kenyon Act (37 Stat. at L. 699); Reed or "Bone Dry" Amendment (39 Stat. at L. 1058, at p. 1069). For a discussion of these cases and these statutes, see the author's *The Constitutional Law of the United States*, vol. II, pp. 962–976.

[5] 28 Stat. at L. 963.

With the exclusion from the mails of lottery tickets and advertisements relating thereto, we are not here concerned, but, as regards their transportation in interstate commerce, the law raised the important question whether it was within the constitutional power of Congress to exclude from such commerce commodities the transportation of which involved no danger to the persons or other property engaged in such commerce. That the real purpose of the act was to discourage a type of business or enterprise of which Congress disapproved, but over which, within the States, it had no direct powers of regulation, was not denied. The question, then, was, whether the measure could be constitutionally defended as an exercise of power granted by the Commerce Clause. In the case of Champion v. Ames[6] the court answered this question in the affirmative.

After arguing that lottery tickets might properly be held to be articles of commerce the court next considered the question whether the exclusion of the tickets from interstate commerce could properly be deemed a "regulation" of that commerce. "Are we prepared," asked the court, "to say that a provision which is, in effect, a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on?"

The court then went on to show that it had come to be generally recognized, as shown by legislation in many of the States, that lotteries are an evil; that they are uneconomic and demoralizing to the people. The court then asked: "If a State when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"

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[6] 188 U. S. 321, 355, 356.

There can be no question that the decision in the Lottery case gave to the regulatory power of Congress with reference to interstate commerce a broader definition than it had previously received. This it did in two respects: It broadened the meaning which had been laid down in the Insurance cases [7] and in the Bills of Exchange case [8] as to what might be considered articles of commerce; and it upheld, as a regulation of interstate commerce, the prohibition of the carrying of an article the transportation of which could not be claimed to interfere in any way with the safety of other commodities carried or with the safety and efficiency with which the general business of interstate transportation is carried on.

However guarded may have been the language of the court, the court must be regarded as having committed itself to the general proposition that the power given to Congress to regulate commerce among the States includes the power to prohibit the carrying or shipping in such commerce of articles with a view not simply of rendering interstate transportation more efficient and safe, or of maintaining proper competitive conditions in interstate trade itself, but of obtaining a social, economic or moral result approved of by Congress as well as by the preponderant opinion of the legislatures of the States, or of the greater number of them, but for the realization of which the States are constitutionally incompetent by reason of their lack of power to control interstate commerce.

It will be observed that this does not commit the Supreme Court to the doctrine that Congress has general authority to secure any social, industrial, economic, or moral ends that it may desire in so far as these ends may be obtained through the exercise of the various powers—including that over interstate commerce—which are granted by the Constitution. The Lottery case is authority only for the doctrine that, where, as a matter of fact, it appears, as it did in the case of lotteries, that the business or transactions, against which the prohibition is directed, is inherently noxious, the use by it of interstate commercial agencies may be denied. In other words, because the business or transaction is noxious, it is one which no one can carry on as a right. Even if, then, it be admitted that, generally speaking, every one has a right to engage in interstate commerce without first obtaining the permission, express or implied, of Congress, and, therefore, that the denial to him of that right is *prima facie* an infringement of his legal rights of liberty and property, it still remains true that, where the business is one which is noxious, or certain of its elements or of the methods of carrying it on are such, the avenues of interstate trade may be closed to it by Congress. In fine, if it is a business which, in its intrastate and domestic aspects, is subject to regulation by the States in the exercise of their so-called police powers, it may similarly be regulated or prohibited by Congress with respect to interstate commerce. But it does not follow from this that Congress has a power of exclusion from interstate commerce which may be arbitrarily exercised without regard to the inherent noxiousness of the commodities or business which is affected.

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[7] Paul v. Virginia (8 Wall. 168); Hooper v. California (155 U. S. 648); N. Y. Life Ins. Co. v. Cravens (178 U. S. 389).

[8] Nathan v. Louisiana (8 How. 73).

Whether or not this wider Federal power may be sustained upon grounds other than those contained in the reasoning and decree of the Lottery case will presently be discussed.

§ 366. Pure Food Act.

By the Food and Drugs Act of June 30, 1906, known as the "Pure Food Act," [9] Congress has prohibited "the introduction into any State or Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded," and that persons shipping or delivering for shipment, or having received, shall deliver in original unbroken package such adulterated or misbranded foods or drugs, shall be guilty of a misdemeanor and shall be subject to a fine or, for repeated offences, imprisonment. Articles thus illegally shipped are made liable to seizure, and, if condemned, to sale or destruction.

In Hipolite Egg Co. v. United States [10] this statute was held valid as an exercise of the power of Congress to regulate commerce, and was construed to authorize the seizure and confiscation of commodities by a proceeding *in rem* after they had reached their destination but while still in their original unbroken packages. The intent of the law was declared to be "not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce."

By act of August 23, 1912, Section 8 of the act of 1906 was so amended as to make the term "misbranded" apply, in addition to the applications specified in the original act, to drugs which should contain any false or fraudulent statement, design or device as to their curative or therapeutic value.

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[9] 34 Stat. at L. 768.

[10] 220 U. S. 45. See also the Federal Caustic Poison Act of March 4, 1927 (44 Stat. at L. 1406). See also, McDermott v. Wisconsin (228 U. S. 115), as to the exclusiveness of this Federal act, and, therefore, as to the inability of the States to legislate in the premises.

In Seven Cases v. United States,[11] in answer to the contention that this caused the act to enter the domain of speculation, and thereby, by virtue of its uncertainty, to operate as a deprivation of property without due process of law, the court said that, in order to bring the goods within the operation of the statute, the statements must, as the act declares, be fraudulent as well as false, and that this was a quality susceptible of proof.[12]

§ 367. Obscene Literature and Articles for Immoral Use.

By act of February 8, 1897,[13] Congress forbade the depositing with any express company or other common carrier for interstate commerce of "any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made." [14]

The constitutionality of this law has not been squarely passed upon by the Supreme Court, but the law has been upheld in a lower Federal court in United States v. Popper,[15] and this case was cited with approval by the Supreme Court in Hoke v. United States,[16] in which the validity of the so-called Mann Act was sustained.

§ 368. Transportation in Interstate or Foreign Commerce of Women for Immoral Purposes.

By act of March 3, 1875,[17] the importation into the United States of women for the purpose of prostitution was forbidden and highly penalized. This provision was superseded by Section 3 of the Immigration Act of March 3, 1903.[18] This provision was in turn superseded by the act of February 20, 1907,[19] which broadened the earlier prohibition by adding "or for any other immoral purpose" to the words "for the purpose of prostitution." The law of 1907 also provides punishment for any one who "shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other purpose, any alien woman or girl, within three years after she shall have entered the United States." Deportation of alien women found inmates of such houses or practicing prostitution within three years after having entered the United States is also directed. The constitutionality of these laws, so far as foreign immigration is concerned, is elsewhere discussed.[20]

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[11] 239 U. S. 510.

[12] For further cases dealing with State police legislation as affected by the Pure Food Law see Savage v. Jones (225 U. S. 501); Weeks v. United States (245 U. S. 618); Weigle v. Curtice Bros. Co. (248 U. S. 285); and Hebe Co. v. Shaw (248 U. S. 297).

[13] 29 Stat. at L. 512. See also the Federal Criminal Code, Sec. 245.

[14] The importation from abroad of the foregoing articles has also been forbidden, as has their deposit for transmission in the mails.

[15] 98 Fed. 423.

[16] 227 U. S. 308.

[17] 18 Stat. at L. 477.

[18] 32 Stat. at L. 1213.

[19] 34 Stat. at L. 898.

By act of June 25, 1910,[21] commonly known as the Mann or White Slave Act, Congress has provided for the punishment of any one who shall knowingly transport or cause to be transported or aid in the transportation in interstate or foreign commerce of any woman or girl for the purpose of prostitution or debauchery or other immoral purpose. The constitutionality of this measure was questioned in the case of Hoke v. United States.[22]

In Wilson v. United States [23] it was held that transportation by a common carrier is not essential to constitute the offence created by the Mann Act. In this case the indictment, which was sustained, charged that the women involved had crossed State borders on an electric railway line, but did not charge that the defendants had directed or knew how the woman was to cross the State line, that is, whether by a common carrier or in a private vehicle.

In United States v. Holte,[24] it was held that a woman might conspire to commit an offence against the United States as provided for in Section 37 of the Federal Criminal Code, although the object of the conspiracy was her own transportation in interstate commerce in violation of the provisions of the Mann Act.

In Caminetti v. United States,[25] the court held that the interstate transportation of a woman for an immoral purpose was interstate commerce and was within the purview of the act even though no pecuniary element had been involved. The court conceded that, for the purpose of the argument, Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. "But," said the court, "this Act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited."

§ 369. Game and Animals Killed in Violation of State Law.

By act of May 25, 1900,[26] known as the Lacey Act, Congress has forbidden the transportation in interstate commerce of "any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the State, Territory or District in which the same are killed." [26a]

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[20] See § 755.

[21] 36 Stat. at L. 825.

[22] 227 U. S. 308.

[23] 232 U. S. 563.

[24] 236 U. S. 140.

[25] 242 U. S. 470.

[26] 31 Stat. at L. 188.

The constitutionality of this act has been upheld in the lower Federal courts,[27] but has not been passed upon by the Supreme Court.

For an account of the Migratory Bird Act passed by Congress in execution of a treaty of the United States, see Missouri v. Holland (252 U. S. 416).

§ 370. Prize Fight Films.

By act of July 31, 1912,[28] Congress has made it unlawful "to bring or cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." It is also made illegal to deposit or cause to be deposited such films or pictorial representations in the United States mails, or with an express company or other common carrier for interstate transportation.

In Weber v. Freed,[29] the portion of this act referring to importation from abroad was sustained with the curt statement that "in view of the complete power of Congress over foreign commerce, and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous."

So far as the author knows, the constitutionality of the interstate commerce provisions of the act have not been questioned or passed upon by the Supreme Court.

§ 371. The Commodities Clause.

The Hepburn Act of 1906 forbids railroads to transport in interstate commerce any commodity, other than timber and its manufactures, which they own in whole or in part, or in which they have an interest direct or indirect, except when such commodities are needed and intended for their own use as common carriers. This prohibition has been upheld in a series of cases which are cited in the footnote.[30]

[26a] A later act inserts the words "or shipped" before the words "in violation of the laws, etc."

[27] Rupert v. United States (181 Fed. 87).

[28] 37 Stat. at L. 240.

[29] 239 U. S. 325.

[30] United States v. Delaware and Hudson Co. (213 U. S. 366); United States v. Lehigh Valley R. Co. (220 U. S. 257); D. L. & W. R. Co. v. United States (231 U. S. 363); United States v. D. L. & W. R. Co. (238 U. S. 516); United States v. Reading Co. (253 U. S. 26).

§ 372. Child Labor and Interstate and Foreign Commerce.

By act of September 1, 1916,[31] Congress provided:

"That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such produce therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian."

This provision was held unconstitutional as to interstate commerce in the case of Hammer v. Dagenhart,[32] as not being a regulation of interstate commerce, and, therefore, as not warranted by the Commerce Clause, but, upon the contrary, as being a regulation of production or manufacture which it is within the exclusive power of the States to regulate.

§ 373. Stolen Automobiles Excluded from Interstate Commerce.

By act of October 17, 1919,[33] known as the "National Motor Vehicle Theft Act" or "Dyer Act," Congress prohibited and penalized the transporting or causing to be transported in foreign or interstate commerce of vehicles known to have been stolen, and also the receiving, storing, bartering, selling or disposing of any motor vehicle moving as, or which is a part of, or which constitutes interstate or foreign commerce, and known to have been stolen.

In Brooks v. United States,[34] the constitutionality of this act was upheld upon the authority of the cases upholding the exclusion of lottery tickets, misbranded and adulterated foods, intoxicating liquors, etc.

§ 374. Summary and Conclusion Regarding Federal Power to Exclude from Interstate Commerce.

It has been seen that the Supreme Court, in a very considerable number of instances, and with reference to a variety of commodities and classes of persons, has recognized the right of Congress to exclude from, and to penalize the transportation, or procuring the transportation, of persons or commodities in interstate commerce. Not yet, however, has the court recognized that this right of exclusion is a plenary one which may be exercised whenever Congress may see fit. The decision in Hammer v. Dagenhart shows this. It may, then, be asked: Just how far has the Supreme Court gone along the path which leads to a wholly arbitrary right of exclusion upon the part of Congress, and just what barriers prevent the reaching of that terminus?

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[31] 39 Stat. at L. 675.

[32] 247 U. S. 251.

[33] 41 Stat. at L. 324.

[34] 267 U. S. 432.

It is clear that, in a broad or general sense, the exclusion of any commodity or class of persons from interstate commerce, whatever be the grounds or criteria upon which that exclusion is rested, is a regulation of that commerce in the sense that it affects the carrying on of that commerce.

It is conceivable, therefore, that the court might have taken this position and declared that the propriety of the exclusion is a matter wholly within the discretion of Congress [35] or, the court might have declared that the right of the individual or corporation to engage in interstate commerce is one that is a distinctively Federal right, the creation of Federal law, and, therefore, that no one has the right to engage in it, or to enjoy its benefits or facilities, except with the consent of Congress,—a consent that may be qualified in any way and accorded upon any terms and with any limitations that Congress may see fit to impose. In other words, the court might have given to interstate commerce the same character as the carrying of the mails.

Had the Supreme Court declared either of the foregoing doctrines, the regulatory power of Congress over interstate commerce would have had no limits save those imposed by the requirements of due process of law. In fact, however, the Supreme Court has not as yet accepted either of these doctrines, although, so far as the author knows, it has never explicitly declared the unsoundness of the second one.

With regard, then, to the power of Congress to exclude from interstate commerce the court has gone this far:

1. It has held that any article the transportation of which may endanger the actual carrying on of interstate commerce, or which will or may contaminate other goods which are being transported, may be excluded.[36]

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[35] This, in substance, was the position which the four dissenting justices in Hammer v. Dagenhart thought the court should take. They said: "Under the Constitution such (interstate) commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."

[36] In Champion v. Ames (188 U. S. 321) the court spoke of lottery tickets as "polluting" commerce, but this could of course be true only in a figurative sense, and could not be used as a valid argument for bringing the exclusion of such tickets within the class of measures adopted as means of securing or promoting the safety or efficiency of transportation.

2. It has been held that, if there is a real and substantial relation between the rule and the carrying on of commerce, the regulation will be valid even though the ultimate effect of the law be to regulate a matter other than commerce, and even though this ultimate effect be really the end sought by Congress. Thus, in McCray v. United States [37] the court declined to look beyond the nature of a law as disclosed upon its face, and test its constitutionality by its ultimate and intended effect. The consequences that might arise from its enforcement, the court held, could not operate to invalidate a law otherwise valid. The law in question being clearly an excise measure, was upheld as such.

3. It has been held that persons or commodities may be excluded from interstate commerce, or the facilities of interstate transportation otherwise refused when such transportation is a step in bringing about a result of which Congress disapproves, and which, but for the facilities offered by interstate commerce, could not be achieved; in other words, that this disapproved result will occur in the States to which the articles or persons are transported, and has not already been brought about in the States of origin.

4. Congress may exercise a right of exclusion from interstate commerce when this is a necessary or reasonable means of rendering effective a policy which, in itself, is one which Congress has the constitutional right to enforce. This type of exclusion is represented in the Commodities Clause of the Hepburn Act of 1906, and also by the provision of the act of February 19, 1903,[38] which, in N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission,[39] was construed to prevent a carrier from becoming the purchaser and seller of the commodities transported by it.

5. The facilities of interstate commerce may not be refused by Congress to commodities not dangerous to transport and of such a character that their use or consumption will do no injury, moral or physical, to any one, simply upon the ground that they have been produced or manufactured in ways or under conditions objectionable to Congress.[40]

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[37] 195 U. S. 27.

[38] 32 Stat. at L. 847.

[39] 200 U. S. 361.

[40] In this Child Labor case it held that the Federal act was void upon the double ground that it was not a "regulation" of Congress, since it was concerned neither with the safety and efficiency of the carrying on of that commerce nor with the prevention of an undesirable result following transportation, and because the act was, in essence, a regulation of production or manufacture,—a matter within the exclusive jurisdiction of the States. This second contention of the court seems a difficult one to agree with for, whatever may have been the motive of Congress in enacting the law—a matter beyond the cognizance of the court—it is certain that the law, upon its face, imposed no obligations upon the manufacturer or mine operator, and left the

As to whether or not the Supreme Court was compelled by the logic of earlier cases to take this fifth position, which it did in Hammer v. Dagenhart,[41] has been much disputed by commentators as well as by the four justices who dissented in that case.

States free to regulate mining and manufacturing as they might see fit. In other words, the Federal law did not begin to operate until the products of the factory or mine were placed in interstate commerce.

[41] 247 U. S. 251. The author has examined the arguments in, and implications of, this case in his larger work, *The Constitutional Law of the United States*, vol. II, pp. 994–997.

CHAPTER XLVI

THE STATES AND INTERSTATE COMMERCE

Thus far in the discussion of the constitutional principles governing the regulation of interstate commerce, the conflicts which have arisen in relation thereto between the National Government and the States have been only incidentally dealt with. In the present and immediately succeeding chapters these conflicts will be directly and specifically considered. But first must be considered certain more general principles governing the competence of the States with reference to interstate commerce.

§ 375. Common-Law Obligations of Interstate Carriers.

In the absence of congressional regulation the common law of the States controls with reference to the so-called common-law rights, duties, and responsibilities of public carriers, interstate as well as intrastate. These rights and duties which relate to reasonableness of service, impartiality of treatment of shippers, liabilities either contractual or in tort for injuries to passengers or freights, etc., have in many instances, it is apparent, more than a local significance and effect, and it is, therefore, somewhat difficult to justify, upon principle, the constitutional authority of the States in these respects. Practical necessity and convenience seem, however, to have demanded that this validity should be ascribed to the common law of the States, for otherwise, in the absence of congressional regulation, there would be no law whatever for the courts to apply.[1] In Murray v. Chicago & N. W. Ry. Co.[2] the argument *ab inconvenienti* was adopted as controlling.

The doctrine that, in the absence of congressional action, these common-law principles should apply even with reference to interstate commerce carriers was declared in a number of cases, and without serious dissent;[3] but in Western Union Tel Co. v. Call Pub. Co.[4] the point was pressed that allowing State law to control interstate commerce with reference to matters not purely local was unconstitutional. The court, however, reaffirmed the doctrine.

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[1] That there is no Federal common law which, in absence of congressional statute, can be made use of is fairly certain. *Cf.* United States v. Worrall (2 Dall. 384); Wheaton v. Peters (8 Pet. 591). But see Western Union Tel. Co. v. Call. Pub. Co. (181 U. S. 92).

[2] 62 Fed. Rep. 24.

[3] Interstate Commerce Com v. B. & O. R. R. Co. (145 U. S. 263); Bank of Kentucky v. Adams Express Co. (93 U. S. 174); Murray v. C. & N. W. R. R. Co. (62 Fed. Rep. 24).

[4] 181 U. S. 92.

In B. & O. R. Co. v. Baugh,[5] with reference to the matter of the fellow-servant doctrine, the court held that it was one of general common law, rather than of the specific common law of the several States, and, therefore, in determining and applying it, the court would not be controlled by the decisions of the State courts, but would exercise its own independent judgment; that is, that it would regard the question as "one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant."

§ 376. Local Regulations Affecting Interstate Commerce.

The rule stated as to the distinction between subjects requiring general and those necessitating, or at least rendering highly desirable, local regulation, is a simple and rational one. It is, however, one which, in application, has not infrequently given rise to considerable difficulty, there being no definite criteria for distinguishing between these two classes of subjects. This has made it necessary that each case should be determined by itself, with the result that the Supreme Court in each instance has decided whether the State law in question was, or was not, regulative of a matter properly requiring national control.

Among the more important subjects which, it has been held, may, in the absence of Federal legislation, be controlled by the States, because they lend themselves to local regulation, are ferries, bridges, pilotage, and harbor regulations, or, in general, the protection and improvement of navigable waters.

The general rule governing all the cases is, perhaps, best stated and the authorities summarized, in Covington, etc., Bridge Co. v. Kentucky.[6]

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[5] 149 U. S. 368.

[6] 154 U. S. 204. "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all. The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. . . . Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots (Cooley v. Philadelphia Port Wardens, 12 How. 299; Pacific Mail SS. Co. v. Joliffe, 2 Wall. 450; *Ex parte* McNiel, 13 Wall. 236; Wilson v. McNamee, 102 U. S. 572); quarantine and inspection laws and the policing of harbors (Gibbons v. Ogden, 9 Wh. 1; New York v. Miln, 11 Pet. 102; Turner v. Mary-

§ 377. Ferries.

That the transportation of persons and property by ferries across rivers or other bodies of water from one State to another State is interstate commerce and subject as such to the regulating power of Congress was declared in Gloucester Ferry Co. v. Pennsylvania;[6a] but that the States, in the absence of Federal regulations, might exercise a measure of control over such ferries, was conceded.[7]

§ 378. Transportation with Both Terminals within a State, but Partly Outside the State.

It is well established that commerce carried on between two points within a State, but involving transportation for a part of the way outside the State, is interstate commerce, and, therefore, subject to corresponding Federal control, and removal from State control.[8]

It would seem that the doctrine as to the taxation of receipts for transportation over routes running outside the State but between points within the State is not to be so strictly construed against the States as is that of the regulation of the rates. This is on the theory that the transportation over such routes is a unit and must be charged for as

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land, 107 U. S. 38; Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health, 118 U. S. 455); the improvement of navigable channels (Mobile Co. v. Kimball, 102 U. S. 691; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678; Huse v. Glover, 119 U. S. 543); the regulation of wharves, piers and docks (Cannon v. New Orleans, 20 Wall. 577; Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80; Northwestern U. Packet Co. v. St. Louis, 100 U. S. 423; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559; Pittsburg & O. R. Transp. Co. v. Parkersburg, 107 U. S. 691; Ouachita & M. R. Packet Co. v. Aiken, 121 U. S. 444); the construction of dams and bridges across the navigable waters of a State (Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245; Cardwell v. American River Bridge Co., 113 U. S. 205; Pound v. Turck, 95 U. S. 459); and the establishment of ferries (Conway v. Taylor, 1 Black, 603). . . . But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are National in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled, and the case falls within the third class—of those laws wherein the jurisdiction of Congress is exclusive. (Brown v. Houston, 114 U. S. 622; Bowman v. Chicago & N. W. R. Co., 125 U. S. 465.)"

See also the opinion of the court in the Minnesota Rate Cases, Simpson v. Shepard (230 U. S. 352), for an extended enumeration of the cases in which, in the absence of Federal legislation covering the same ground, State regulations, though affecting interstate commerce, have been upheld.

[6a] 114 U. S. 196.

[7] *Cf.* Covington & C. Bridge Co. v. Kentucky (154 U. S. 204); Port Richmond & B. P. F. Co. v. Board of Freeholders (234 U. S. 317); Vidalia v. McNeely (274 U. S. 676); Sault Ste. Marie v. International Transit Co. (234 U. S. 333).

[8] Hanley v. Kansas City Southern R. Co. (187 U. S. 617); United States v. D. L. & W. R. Co. (C. C.) (152 Fed. Rep. 269).

such, whereas a tax on the railway company based on the amount of transportation over its roads within the State is a reasonable one.[9]

In Chicago, M. & St. P. R. Co. v. Iowa[10] it was held that the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement and thus prevent the reshipment to a point within the State from having an independent and intrastate character, and as such being subject to State control.

§ 379. The Police Powers of the States and Commerce.

Very closely related to the authority of the States to legislate with reference to commercial matters of a local character, is the power of the States, in the exercise of their police powers, to enact and enforce measures which incidentally, but often substantially, affect interstate commerce.

The distinction that is drawn between these police powers of the States, and their authority to enforce local commercial regulations is that, in the absence of countervailing Federal legislation, the latter are valid even though conceded to bear directly upon interstate or foreign commerce; whereas the police regulations are only valid when their influence upon interstate or foreign commerce is but an incidental or indirect one. In other words, as to matters of local concern, the States are recognized to have a concurrent legislative power in the fields of interstate and foreign commerce; while, as to police measures (and the same is especially true as to tax laws or other State laws for the regulation of domestic commerce) the States have an authority which is not concurrent with that of the United States. Thus, local regulations even though they operate directly upon interstate and foreign commerce are valid unless and until there is Federal legislation concerning the same subject. Tax laws, laws for the regulation of domestic commerce and police regulations, upon the other hand, have no constitutional validity whatever if they operate directly and primarily as a restraint upon interstate or foreign commerce as such.

To the writer it would seem that the foregoing distinction between the concurrent local legislative powers and the police powers of the States with reference to interstate and foreign commerce is an unnecessary and confusing one, for the fact is to be noted that all of the local regulations which have been referred to in the preceding section may properly be described as police regulations and justified as such. If, and when, so justified, it will be possible for the courts, without changing substantially the effect of its holdings, to accept finally and completely the doctrine of the exclusiveness of the Federal authority over interstate and foreign commerce, and base the validity of local State commercial regulations, not upon a State concurrent legislative power to regulate interstate commerce as to local matters which are not susceptible of, or which do not demand national regulation as to local matters, but upon the States' police or other reserved powers. However, the courts still recognize the distinction between the two sources of State power to affect interstate commerce by their legislation, and this practice is, therefore, here followed.

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[9] Lehigh Valley R. Co. v. Pennsylvania (145 U. S. 192); Ewing v. Leavenworth (226 U. S. 464); Western Union Tel. Co. v. Speight (254 U. S. 17).

[10] 233 U. S. 334.

That a State law which, in its essential nature, is a legitimate exercise of the police power is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected is well established.

The cases dealing with State police laws, whether relating to the running of trains, inspection and quarantine laws, game laws, etc., are too numerous to review. In truth, however, a review of them would lead to no considerable light upon the general constitutional principle that has been stated, since the decisions in these cases almost wholly depended upon the judgment of the court as to whether the specific regulations did or did not directly, and not too seriously, interfere with the free course of interstate trade.[11]

It will, however, be desirable to say something with regard to State control of motor vehicles.

§ 380. State Control of Motor Vehicles on State Highways.

The constitutional right of the States to regulate motor vehicles, even though interstate commerce be thereby incidentally affected, is strengthened when these vehicles are using highways which have been constructed and maintained, wholly or in part, by the States. The respective constitutional rights of the Federal Government and the States in this respect received their first careful consideration in Hendrick v. Maryland,[12] decided in 1915. In that case it was held that, in the absence of congressional legislation, a State might prescribe uniform regulations reasonably necessary for the public safety and order in respect to the operation of motor vehicles upon their highways, even though such vehicles were moving in interstate commerce. The State law upheld in this case required the registration of such vehicles, the licensing of their drivers, and a reasonable charge for such registration, based upon the horse power of the vehicles, and for the drivers' licenses.

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[11] See vol. II, Chapter LIV of the author's *The Constitutional Law of the United States.*

[12] 235 U. S. 610.

The Maryland law also provided that non-residents of the State in order to have limited use of the highways without cost must have complied with similar laws in their respective States. All moneys collected under the act, except so much as might be necessary for salaries and other expenses for the enforcement of the act, were to be used in the construction, maintenance, and repairing of the streets of the city of Baltimore, and of roads built or aided by a county or by the State itself.

In Kane v. New Jersey,[13] a substantially similar law of the State of New Jersey was upheld.[14]

In Michigan Public Utilities Com. v. Duke,[15] a new set of facts was involved. Here the State law provided that no person should engage in the business of transporting persons or property by motor vehicles for hire over the public highways of the State over fixed routes or between fixed termini without a permit so to do obtained from the Public Utilities Commission of the State,—a permit which might be refused if the applicant was not able to show that he was able to furnish adequate, safe, or convenient service to the public; and that all common carriers within the purview of the act should take out indemnity bonds, in an amount to be fixed by the Utilities Commission, for the payment of all just claims and liabilities resulting from injury to property carried by such carriers. The appellee in this case was a private carrier engaged solely in interstate commerce. The Supreme Court held the act invalid as a direct interference with interstate commerce.

In Frost v. Railroad Commission of California [16] it was held that the plaintiff in error, who was engaged under a single private contract in transporting for a stipulated compensation certain goods over the public highway of a State between fixed termini, could not, without a denial to him of due process of law, be declared to be a public carrier, and, as such, be compelled to submit to the requirements of the State law governing the use by public carriers of the State's public highways.

In Buck v. Kuykendall [17] the court held invalid a State law which prohibited the use of the highways of the State by busses transporting passengers for hire over regular routes without a certificate from the Director of Public Works of the State, and which further provided that such certificate should not be issued if the territory were deemed to be already adequately served. Contrasting this law with those State laws which, in previous cases, had been upheld, the court said: "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through State officials, to a test which is peculiarly within the province of Federal action—the existence of adequate facilities for conducting interstate commerce."

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[13] 242 U. S. 160.

[14] This law, unlike the Maryland law, provided that non-residents should appoint an agent within the State upon whom process might, if necessary, be served. This requirement, the court held, was not unduly burdensome and did not deny to non-residents the equal protection of the law. "On the contrary, it puts non-resident owners upon an equality with resident owners."

[15] 266 U. S. 570.

[16] 271 U. S. 583. No question of interstate commerce was involved in this case.

[17] 267 U. S. 307.

In Bush & Sons Co. v. Maloy,[18] decided at the same time as the Buck case, the court held invalid a Maryland law which prohibited common carriers of freight by motor vehicles from using the public highways of the State over specified routes without first obtaining permits from the Public Service Commission of the State, and which gave to such Commission discretion in the matter of issuing such permits.[19]

In Morris v. Duby [20] a State law was upheld which reduced the maximum load of motor trucks operated on State highways constructed and maintained by Federal aid in accordance with Federal laws the provisions of which had been assented to by the State. The court said that the acts of Congress did not disclose any provision, express or implied, of withholding from the State any of its ordinary police power to conserve the highways in the interests of the public.

In Clark v. Poor [21] it was held that users of public highways, though engaged exclusively in interstate commerce, are subject to reasonable State regulations as regards safety, convenience and the conservation of the highways, and that common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use by the State. The court pointed out that, in the instant case, there was no suggestion that the tax discriminated against interstate commerce, or that it was so large as to obstruct that commerce.

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[18] 267 U. S. 317.

[19] In the course of its opinion the court said: "This case presents two features which were not present in Buck v. Kuykendall, decided this day. The first is that the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the Buck Case. The Federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that State highways shall be open to interstate commerce. The second feature is that here the permit was refused by the commission, not in obedience to a mandatory provision of the State statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The State action in the Buck Case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the director of public works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the commerce clause for Federal regulation."

[20] 274 U. S. 135.

[21] 274 U. S. 554.

In Hess v. Pawloski [22] it was held that due process of law was not denied by a State law which declared that the use of its highways by non-resident operators of motor vehicles should be deemed equivalent to the appointment by such non-residents of the State registrars as agents upon whom process might be served for initiating proceedings against them growing out of collisions or accidents in which they might be involved on such highways, but requiring that the non-residents should actually receive and receipt for notice of the service of such processes, and that they should be given a reasonable time and opportunity for defence.

In Wuchter v. Pizzutti [23] it was emphasized that a State law designating a State official as the person to receive service of process in an action against a non-resident must contain a provision which makes it reasonably probable that the notice will be communicated to the person sued.

In Sprout v. South Bend [24] it was held that a motor bus was engaged in intrastate business even though it required persons taken up and discharged within a State to purchase tickets to points outside the State. The provision that persons operating motor busses should secure liability insurance from an insurer authorized to do business within the State was held to be within the power of the State, which power might be delegated to a municipality, and applied to persons doing an interstate business. The doctrine was also again stated that, in the absence of Federal regulation concerning the subject, the States may exact license fees of vehicles using its highways exclusively in interstate commerce, provided these fees are not discriminatory as regards interstate commerce, and not larger in amount than is reasonably necessary to defray the expenses of administering the State's regulations for the promotion of the safety and convenience of the public. It was also held that the States may impose on motor vehicles engaged exclusively in interstate commerce a reasonable charge as a fair contribution towards the cost of constructing and maintaining the State's public highways; or they may levy upon the operators of vehicles engaged in both intrastate and interstate commerce an occupation tax provided it appear that the tax is imposed solely upon the intrastate business and its payment is not made a condition precedent to the permission to engage in the interstate business.

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[22] 274 U. S. 352.

[23] 276 U. S. 13.

[24] 277 U. S. 163.

CHAPTER XLVII

THE ORIGINAL PACKAGE DOCTRINE

§ 381. The Original Package Doctrine.

The right to import, including the right of the importer to sell the goods imported, and the right to engage in interstate and foreign commerce being a Federal right, the States have no more constitutional power to restrain or regulate the sale of imported commodities by the importer than they have to prevent or regulate their being brought within the State.

This principle was first clearly declared by Marshall in Brown v. Maryland.[1] "Sale," declared the Chief Justice, "is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. . . . Congress has a right not only to authorize importation, but to authorize the importer to sell."

The case of Brown v. Maryland had to deal with foreign commerce and it seemed for a number of years that its application would be limited to that commerce. Indeed, that this was so was intimated as late as 1886 in Robbins v. Taxing District.[2] But, in Bowman v. Northwestern Railroad,[3] decided in 1887, the reasoning indicated that the doctrine would be applied to interstate commerce, and, in Leisy v. Hardin,[4] decided in 1890, this was squarely declared and has since been repeatedly affirmed.

The fact that the right to engage in commerce carries with it the right to sell the goods transported, does not, it has been held, exclude the right of the State to tax goods brought from another State still unsold, and still in their original packages, provided such goods be not discriminated against because of their having been brought into the State from another State. As to imports from foreign countries, however, the rule is that, until sale in the original package, or until the breaking of the package, no State tax may be imposed. This prohibition is, however, not drawn from the Commerce Clause but from the express provision of the Constitution that "No State shall, without the consent of Congress, lay any impost or duty on imports or exports" (Art. I, Sec. 10).[5]

From the foregoing it appears that the State's authority over articles brought in from the other States does not attach, except for purposes of taxation, until the articles so brought in have been sold. However, as is elsewhere shown, this rule is modified by the doctrine that, whether sold or not, the articles brought in lose their interstate commercial character, and full State authority at once attaches, as soon as these articles have in any way become mixed with the general mass of the property of the State to which they have been transported. As a convenient test for determining when this commingling takes place, the Supreme Court early developed the so-called "Original Package" doctrine. This doctrine is that, so long as the commodity is kept in the unbroken package in which it is delivered to the carrier for transportation, no commingling with the State goods has taken place. At times this has been stated by the courts and by commentators as an absolute rule. In fact, however, as will appear from the cases which will be reviewed, the doctrine does not state a right to which the exporter is entitled, but declares a test which the court frequently finds convenient to apply for determining when commingling of the imports with State goods has taken place, but which in other cases may be held inapplicable because of the character of the goods transported.

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[1] 12 Wh. 419.

[2] 120 U. S. 489.

[3] 125 U. S. 465.

[4] 135 U. S. 100.

[5] Low v. Austin (13 Wall. 29).

The original package doctrine was first stated by Marshall in Brown v. Maryland[6] with reference to the prohibition laid upon the States as to the taxation of exports and imports.

In Bowman v. Railway Co.[7] the court had held that a State could not forbid a common carrier to bring intoxicating liquor into the State from another State or Territory except upon the conditions mentioned in the act. In Leisy v. Hardin[8] the court took the further step of declaring that the importers had the right to sell in the original packages, unopened and unbroken, articles brought into the State from another State or Territory, notwithstanding a statute of the State prohibiting the sale of such articles except for the purposes mentioned therein and under a license from the State.

In Schollenberger v. Pennsylvania[9] the original package test was applied to interstate shipments of oleomargarine.

The breaking of the "Original Package" must be for purpose of sale.[10]

However, there is some ground for holding that the States may exercise their police powers with reference to goods in interstate commerce, even in the original packages, if the goods are such as are, in themselves, dangerous to the health or safety of the inhabitants of the States, e. g., explosives, diseased cattle, etc. Thus, in Williams v. Walsh,[11] the court upheld a State law which made it unlawful to sell or deliver black powder for use in coal mines in the State except in original sealed packages of a certain specified character. It did not appear in the case that the plaintiff was an importer, but, referring to this fact, the court said (speaking *obiter*), "We do not wish to be understood as intimating that if such proof had been made, it would have been a defence. Powder is an explosive, dangerous to handle, the degree of danger corresponding to its quantity. It is subject, therefore, to a measure of regulation from which harmless articles of commerce may be exempt." [12]

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[6] 12 Wh. 419.

[7] 125 U. S. 465.

[8] 135 U. S. 100.

[9] 171 U. S. 1.

[10] May & Co. v. New Orleans (178 U. S. 496).

[11] 222 U. S. 415.

§ 382. Difficulties in Applying Original Package Doctrine.

The Original Package Doctrine, simple in itself, becomes at times difficult, and, indeed, impossible of strict application because it is sometimes not easy to determine what is to be considered the original package which, until broken, preserves the commodity from State control. In some cases, indeed, there is no package whatever to be broken. These difficulties are illustrated in the cases which follow.

In May & Co. v. New Orleans[13] it was contended, as to certain foreign imports, that the original packages were not the larger boxes, cases, or bales in which the goods were imported, but the smaller packages contained therein, and that, until these latter were broken, the commingling with the other goods of the States to which they had been brought did not take place. The court, however, held that the larger case or bale was the original package.

In Austin v. Tennessee,[14] decided six months after the May case, the court was confronted by a case in which there was no larger bundle or case, the articles in question—cigarettes—being shipped and transported in small paper packages, without, however, being separately addressed, these packages being taken from loose piles of such packages at the factory by the express company in baskets furnished by the express company, transported in such baskets, and emptied therefrom on the counters of the consignees in the States to which shipped. Here, though there was no larger box or bale, the court declined to hold the small packages to be the "original" packages, and said that the original package, if there were one, was the basket.

In this Austin case, it is clear that the court was not at all sure that, from the very circumstances of the case, the Original Package Doctrine was applicable; and this became still clearer in Cook v. Marshall,[15] decided in 1905, in which there was not even a basket, the small packages being shipped absolutely loose, and, presumably, shoveled into and out of the car, and delivered in that condition to their consignees. The court, however, held that these small packages, even before opening, were subject to the police and taxing powers of the State.

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[12] Citing Nashville, C. & St. L. R. Co. v. Alabama (128 U. S. 96); Foster v. Kansas (112 U. S. 206); Plumley v. Massachusetts (155 U. S. 461); Austin v. Tennessee (179 U. S. 343) and Asbell v. Kansas (209 U. S. 251).

[13] 178 U. S. 496.

[14] 179 U. S. 343.

[15] 196 U. S. 261.

These cases sufficiently establish the fact that the Original Package Doctrine is not so much a rule necessarily to be followed by the court for fixing precisely the time at which interstate commercial transactions end and the full State authority over the articles transported attaches, as it is a test which in many cases may conveniently be applied for determining this fact. And that, when the nature of the case is such as to render this test inapplicable, the court will have to ascertain from other circumstances whether or not interstate commerce has ended.

In McDermott v. Wisconsin[16] the court held that the word "package" or equivalent expressions, as used by Congress in the Food and Drug Act of June 30, 1906,[17] was intended to refer to the immediate containers of articles and not simply to the outside wrappers or boxes containing the packages intended to be purchased by consumers. As thus construed, the court held that a State law permitting the sale of certain goods only when bearing the labels prescribed by the State was an unlawful attempt to discredit and burden legitimate Federal regulations of interstate commerce.

In Askren v. Continental Oil Co.[18] a State law was held void which sought to impose an excise tax on gasoline, and a license tax on distributors and retail dealers therein, when applied to sales in the original barrels and packages in which the gasoline was shipped into the State from another State, as well as to sales to single customers of the entire contents of tank cars.

In Sonneborn Bros. v. Keeling[19] it was held that oil transported into the State and held in warehouses for sale and delivery therefrom in the original packages, might be taxed under a State law applying without discrimination to all wholesale dealers in oil in the State; but that this tax could not be applied to sales of oil made in the State before the oil to fulfill such sales had been sent into the State, nor could the soliciting of such orders be taxed by the State.

The Original Package Doctrine does not restrain the power of the Federal Government from extending its protection beyond the time when the package is destroyed and the goods commingled with the other goods of the State, so far as this is necessary to prevent burdens imposed by the States upon such imports by reason of their foreign origin; or from withdrawing its protection before the breaking of the package as was done by the Wilson Act of August 8, 1890.[20]

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[16] 228 U. S. 115.

[17] 34 Stat. at L. 768.

[18] 252 U. S. 444.

[19] 262 U. S. 506.

[20] *In re* Rahrer (140 U. S. 545).

CHAPTER XLVIII

POWER OF THE STATES TO EXCLUDE FROM INTERSTATE COMMERCE

§ 383. Power of the States to Exclude from Interstate Commerce.

It has already appeared that the Supreme Court has never committed itself squarely to the proposition that the right to engage in interstate trade is one which owes its existence to Federal creation, express or implied, but only that, whatever its source, it is one exempt from State interference or restraint. It is clear, however, that the right does not owe its existence to express creation by the States. Hence it would seem that it is one that stands upon exactly the same common-law plane as the right to hold property or to engage in any business not inherently illicit, and differs from them only in the fact that it is subject to general regulation by the Federal Government and withdrawn from regulation by the States.

It is clear that the lack of power of the State to regulate interstate commerce carries with it the disqualification to exclude persons from engaging in such commerce or to prohibit the carrying of persons or property therein, except in so far as such exclusion may be a legitimate exercise of the police power. In Crutcher v. Kentucky[1] was involved an act of the State requiring from the agent of a foreign express company a license, and the payment of a license fee, as a condition precedent to being permitted to carry on business within the State. The court held this law void as to parties, carrying on interstate commerce, and said: "To carry on interstate commerce is not a franchise or a privilege granted by the State: it is a right which every citizen of the United States is entitled to exercise under the Constitution of the United States." The fact that a corporation and not an individual was concerned was considered immaterial, the opinion continuing: "The accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of their right, unless Congress should see fit to interpose some contrary regulation on the subject." Furthermore, the court declared that the fact that the company was doing some local business incidental to its interstate business, which latter was its main business, did not obviate the objection that the State regulations in question restrained the company from carrying on an interstate business. "Whether intended as such or not, they operate as such."

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[1] 141 U. S. 47.

In Pensacola Telegraph Co. v. W. U. Telegraph Co.[2] an act of a State, which attempted to confer exclusive rights upon a telegraph company, was held void in so far as it was in conflict with the act of Congress of 1866, giving the right to telegraph companies "to construct, maintain and operate lines of telegraph through or over and along any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." In its opinion the court said that it was unnecessary to decide how far the States might have acted if Congress had not legislated upon the subject. The court has, however, declared in other cases that the non-action of Congress is to be deemed equivalent to a declaration that commerce among the States shall be free from State restraint.[3]

It is thus clear that a State may not prevent a person or a foreign corporation from entering its borders for the purpose of engaging in interstate commerce.

The doctrine is generally accepted, though there are no cases in the Supreme Court directly in point, that corporations, though enjoying the Federal right to enter the various States for the purpose of carrying on an interstate commerce business therein, have not powers of eminent domain there. It may possibly be, however, that, when the point is squarely presented, the court will hold that the right may be exercised by the company when necessary and incidental to the carrying on of its interstate commerce business. This doctrine, has, indeed, been definitely stated by at least one State court.[4] And in West v. Kansas Natural Gas Co.[5] the court held that a State might not, as a means of preventing the transportation of natural gas outside the State, refuse to permit the construction of pipe lines except by domestic companies, which companies should have the exclusive right of eminent domain, and the right of use of the public highways. In its opinion the court quoted with approval the statement of the Circuit Court of Appeals in Haskell v.

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[2] 96 U. S. 1.

[3] "The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." Bowman v. Chicago, etc., Ry. Co. (125 U. S. 465). For similar statements see Leisy v. Hardin (135 U. S. 100) and West v. Kansas Natural Gas Co. (221 U. S. 229).

[4] W. U. Tel. Co. v. Superior Court (115 Pac. 1091) (Cal. Dist. Ct. of App. 1911), cited by Cooke in his article, "The Right to Engage in Interstate Transportation," 21 *Yale Law Journal*, 210.

[5] 221 U. S. 229, 261.

Cowham[6] that: "No State, by the exercise of or by refusal to exercise, any or all of its powers, may prevent or unnecessarily burden interstate commerce within its borders in any sound article thereof. No State, by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

This Natural Gas Co. case is, then, authority for the doctrine that a State cannot refuse the right of eminent domain to a corporation, foreign or domestic, or to an individual, when employed for the purpose of carrying on interstate commerce, if the right is given to similar corporations or individuals engaged in domestic commerce, and possibly, indeed, for the broader doctrine that in no case may a State deny to a foreign corporation a power or right the exercise of which is incidentally necessary or, perhaps only convenient or expedient, for the carrying on of an interstate commerce business.

Thus far we have been speaking of the lack of power of the States to prevent individuals or corporations from entering or carrying on interstate or foreign commerce within their respective territories. Turning now to their power to prevent specific commodities from being brought across their borders, it is found that exclusion may be constitutionally justified only when reasonably necessary as a police measure, that is, where the excluded commodities are, in themselves, not merchantable or such as may not be safely transported.

In Bowman v. Ry. Co.[7] the court said: "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution."

This power of exclusion by the States may not be exercised by the States with reference to articles as a class, unless, as an entire class, they are intrinsically unfit for commerce and not merchantable. In all other cases their unfitness for commerce must be determined by inspection and upon reasonable grounds. In the Bowman case the court said: "It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

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[6] 187 Fed. 403.

[7] 125 U. S. 465.

In no case may the States exclude from their borders or interfere with the importation of such articles as have directly or impliedly been recognized by Congress as legitimate articles of interstate commerce. And, furthermore, it is an established principle that, as to articles legitimately the subjects of commerce, the silence of Congress as to them is to be construed as equivalent to a declaration that interstate trade as to them is to be unrestricted.

These principles have been excellently illustrated with reference to State liquor and oleomargarine laws.[8]

In Geer v. Connecticut,[9] it was held that a State might prohibit the transportation out of the State of wild animals killed within the State. This was upon the ground that, until reduced to private possession, the ownership of *feræ naturæ*, so far as they are capable of ownership, is in the State, and the State, in its sovereign capacity, if not as proprietor, is entitled to conserve them for the benefit of its people. The State, therefore, has the right to determine under what conditions and for what purposes wild game may be reduced to private possession and ownership.

In Hudson County Water Co. v. McCarter [10] it was held that a State, under its police power, might prevent riparian owners from diverting the waters of a stream of the State into another State for use therein. This case involved no question of interstate commerce, but is mentioned because of its relation to the general rights of the States with reference to the conservation of their natural resources. The objection which had been raised to the law in question was based upon the due process of law and equal protection of the laws clauses of the Fourteenth Amendment.

In West v. Kansas Natural Gas Co.[11] it was held that natural gas, when reduced to possession, is the property of the owner of the land from which it issues, and may be the subject of both intrastate and interstate commerce. As such, it was held that a State statute was unconstitutional, as an interference with interstate commerce, which prohibited the construction of pipe lines or the transportation of the gas by such lines except by domestic corporations whose charters should provide that the gas should not be transported to, or delivered to, any person or corporation engaged in transporting or furnishing gas to points outside of the State. In order to distinguish the situation with regard to such commodities as natural gas and oil from animals *feræ naturæ*, the court pointed out in that, as to *feræ naturæ*, all persons have the power to reduce them to possession, whereas, in the case of gas, oil, timber, minerals, etc., this is limited to the proprietors of the surface lands from which they are taken.

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[8] People v. Marx (99 N. Y. 377); Powell v. Pennsylvania (127 U. S. 678); Plumley v. Massachusetts (155 U. S. 461); Collins v. New Hampshire (171 U. S. 30); Schollenberger v. Pennsylvania (171 U. S. 1), and cases previously cited with regard to State liquor legislation.

[9] 161 U. S. 519.

[10] 209 U. S. 349.

[11] 221 U. S. 229.

In Pennsylvania v. West Virginia and Ohio v. West Virginia,[12] decided in 1923, and sometimes known as the "Natural Gas Case," the court held void, as an unconstitutional interference with interstate commerce, a law of the State of West Virginia which, with intent of conserving to her own citizens the supply in the State of natural gas which, it was believed, was being exhausted, or, at any rate would not be able to supply the entire demand of other States to which it was being piped as well as the demands of its own citizens, provided that every person engaged in supplying natural gas for the use of the public should, to the extent of his supply, furnish gas for all purposes for which it might be desired by the people of the State, and that the Public Service Commission of the State should have the necessary authority to compel the establishment of reasonable pipes or other conduits for the purpose. The court held that this law, taken in connection with the circumstances surrounding it, would, if enforced, necessarily operate to compel the diversion to local consumers of a large part of the gas which at the time was going, and which previously had gone, to consumers in the complainant States, and, therefore, would work a serious interference with that interstate commerce. The contention on behalf of the State of West Virginia that the law was justified as a reasonable measure for conserving a natural resource the court held to have been answered by the case of West v. Kansas Natural Gas Co.

In People's Natural Gas Co. v. Public Service Commission of Pennsylvania,[13] it was held that natural gas moving continuously in pipe lines between States is in interstate commerce throughout such movement, even though title to it may change at State boundaries; but that gas produced in a State and supplied by pipe lines to consumers within the State is in intrastate commerce although commingled with a definitely known quantity of gas moving in interstate commerce.

It is clear, then, that, though the commerce clause places no restriction upon the constitutional power of the States to regulate or even prohibit the manufacture within their limits of specific commodities, thay cannot base their permission to manufacture or produce upon the condition that the commodities manufactured or produced shall not be sold or shipped outside of the State. Such a condition amounts not only to a limitation upon, but a discrimination against, interstate commerce.

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[12] 262 U. S. 553.

[13] 270 U. S. 550.

In Eureka Pipe Line Co. v. Hallanan [14] it was held that oil gathered in the State by a pipe line company and transported by it was, so far as it became a part of the stream of oil passing into other States, in interstate commerce from the time it left the wells, and as such, was not subject to a State law subjecting the company to a license or occupation tax the amount of which was measured by the volume of traffic carried on by the company.

In United Fuel Gas Co. v. Hallanan [15] the same holding was made as to natural gas.

As to cases, which were alleged by appellants to sustain the proposition that sales of merchandise in the original packages made after being brought into the State were exempt from State taxation, the court pointed out that Standard Oil Co. v. Graves [16] was one involving excessive inspection fees; and that, in Askren v. Continental Oil Co.[17] and Bowman v. Continental Oil Co.[18] the point involved was a substantially similar one. As to the case of Texas Co. v. Brown,[19] in which a State inspection law resulting in receipts greatly in excess of the cost of inspection, and which had been construed by the State court to be an excise tax, and held valid as to oil shipped from another State into the State and there stored for distribution and sale, the court held that the decision had been a correct one, and for the correct reason, but that the following language used by the court in the Texas Co. case in distinguishing it from previous cases needed to be qualified if intended to apply to oil sold after arrival in the State: "Appellant insists that Standard Oil Co. v. Graves, 249 U. S. 389, is inconsistent with the imposition of inspection fees on a revenue basis upon goods brought from another state, however held or disposed of in Georgia. That decision, however, extended the exemption from such fees of goods brought from State to State, no further than 'while the same are in the original receptacles or containers in which they are brought into the State' (pages 394, 395), and so it was interpreted in Askren v. Continental Oil Co., 252 U. S. 444, 449."

§ 384. Charter Provisions.

The State which grants a charter of incorporation to a company may, as a condition precedent to the grant, stipulate that the company shall pay into the State's treasury a certain percentage of its receipts, or be liable to a certain tax on the amount of its capital stock, or to a special property tax, and the fact that these receipts are derived from its interstate commerce business, or that its property is so employed does not render the stipulation void. The sums so paid are not paid because of the interstate commerce done, but as a payment to the State for the charter which it has obtained, and which the State could grant or withhold as it might see fit.[20]

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[14] 257 U. S. 265.

[15] 257 U. S. 277.

[16] 249 U. S. 389.

[17] 252 U. S. 444.

[18] 256 U. S. 642.

[19] 258 U. S. 466.

But a State may not in a charter which it grants reserve to itself a right to regulate the interstate commerce business of a corporation, for it does not lie within the power of a State thus by its own act to obtain an authority over matters vested exclusively in the Federal Government.[21]

A State, when granting a charter of incorporation, may determine what manufacturing a corporation may engage in, and thus prevent it from manufacturing any but specific commodities: but the power to manufacture being granted, it may not, by charter provision or otherwise, prevent, or, except as required by reasonable police precautions, in any way restrain the shipment and sale of the manufactured commodities outside of the State. So, similarly, with reference to carrier companies, the State of incorporation may grant or refuse to a carrier company a right to do business as a corporation, but, the right once granted, it may not prevent the corporation from doing an interstate carrier business.

Since the decision of Paul v. Virginia,[22] there has been no doubt that, generally speaking, the States have a free discretion to determine whether or not a foreign corporation shall be permitted to do a domestic, that is, an intrastate, business, within their several limits. Predicated upon this right some States have attempted to control such corporations in the exercise of their Federal rights, by making the continuance of the right to do a domestic business contingent upon the non-exercise by the corporations concerned of certain of their Federal rights. This has been attempted especially with reference to their Federal right of removing into Federal courts, on the ground of diversity of citizenship, suits instituted against them by citizens of the States where they are doing business. The principles with reference to this effort on the part of the States to control the exercise of distinctively Federal rights, have been earlier discussed,[23] and it is only necessary to say here that they can be applied should the States seek, in a similar manner, to control the right to engage in interstate commerce.[24]

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[20] Railroad v. Maryland (21 Wall. 456).

[21] Louisville & N. R. Co. v. Railroad Com. of Tenn. (19 Fed. Rep. 679).

[22] 8 Wall. 168.

[23] See § 109.

[24] See, for example, Western Union Tel. Co. v. Kansas (216 U. S. 1), in which a State sought to require the payment by a foreign telegraph company, doing both an

§ 385. Exclusion from Foreign Commerce.

In what has gone before reference has been had to the constitutional incompetency of the States with respect to exclusion from interstate commerce. There has never been any doubt that an equal incompetency exists with respect to foreign commerce. Indeed, so far as these two fields of commerce are concerned, the immunity of foreign commerce from State restraint and regulation has always been held more obvious, if not more absolute, than that of interstate commerce.[25]

In The Abby Dodge,[26] declaring the constitutional right of Congress to prohibit, as it had done by the act of June 20, 1906,[27] the landing at any port or place in the United States of sponges taken outside of State territorial waters, the court said: "Practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United States.[28] Indeed, as pointed out in the Buttfield case, so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."

See, also, Weber v. Freed,[29] in which was sustained the constitutionality of the act of Congress of July 31, 1912,[30] making it unlawful to bring or cause to be brought into the United States films or other pictorial representations of prize fights for purposes of public exhibition. The court said that the contention that Congress, by such prohibition, had exceeded its constitutional powers over foreign commerce was so devoid of merit as to be frivolous.

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interstate and a local business of a given per cent of entire authorized capital stock as a condition precedent to being allowed to do a local business in the State. This case is all the stronger in that it was rendered prior to the overruling of the holding of the court in Security Mutual Life Ins. Co. v. Prewitt (202 U. S. 246). See also Pullman Co. v. Kansas (216 U. S. 56); Ludwig v. W. U. Tel. Co. (216 U. S. 146). But see Baltic Mining Co. v. Massachusetts (231 U. S. 68), in which a State tax was upheld with reference to a company which could do and was doing a purely local and domestic business separate from its interstate business.

[25] Crutcher v. Kentucky (141 U. S. 47).

[26] 223 U. S. 166, 176.

[27] 34 Stat. at L. 313.

[28] Buttfield v. Stranahan (192 U. S. 470) and authorities there collected.

[29] 239 U. S. 325.

[30] 37 Stat. at L. 240.

CHAPTER XLIX

INTRASTATE RATE REGULATION BY THE STATES IN ITS RELATION TO INTERSTATE COMMERCE

§ 386. Intrastate Rates.

The constitutional right of the States to regulate the rates and other charges to be made for the rendition of intrastate carrier services, has not, as a general proposition, been contested. Viewed thus as a general or original proposition, the power of the States in the premises is the same as that of the Federal Government with reference to interstate and foreign trade. Difficulty has, however, arisen with reference to the application of these two powers by reason of the fact that, though distinct from each other, the exercise of the one power within the States necessarily produces, in many cases, an effect within the field of interstate commerce, and vice versa. With regard to the problems thus arising with regard to the regulations of rates which necessarily, as a matter of fact, affect both interstate and intrastate trade, it will be found that the principles of constitutional law, as expressed in the decisions of the courts as well as in the policies of Congress as expressed in its statutes, have shown a steady progress toward the doctrine that whenever the rates charged for intrastate traffic affect in any way, even though only incidentally, the rates chargeable for interstate traffic, the Federal Government may, to the extent that may be necessary, prevent that interference by itself controlling intrastate rates. The same doctrine has been applied to all forms of interstate commerce regulation, but it is with reference to rate regulation that the doctrine has been most carefully worked out.

In the Granger Cases, decided in 1876, the Supreme Court recognized the right of the States to fix rates of carrier companies not only for intrastate transportation, but, incidentally or indirectly, for the portions of interstate transportation within their several limits, provided Congress had not acted in the premises.[1]

However, in Wabash, St. L. & P. R. Co. v. Illinois,[2] there was a stiffening of the court's view with regard to the right of the States to control, even indirectly and incidentally, interstate rates. In that case the court said that it could uphold the State law only as applied to contracts for carriage beginning and ending within the State, and disconnected with a continuous carriage through or into other States.

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[1] Peik v. Chicago & N. W. R. (94 U. S. 164).

[2] 118 U. S. 557. See also Covington & Cinn. Bridge Co. v. Kentucky (154 U. S. 204).

In still further limitation of the power of the States to regulate domestic rates of public service corporations, was the doctrine, declared in Smyth v. Ames,[3] that a State, in determining whether a proposed rate will leave a reasonable net profit to the company, may not take in consideration the entire business of the company if some of that business is interstate in character.

§ 387. Minnesota Rate Cases.

In the Minnesota Rate Cases—Simpson v. Shepard[4]—the court took a decided step forward in the matter of subordinating the rate-fixing powers of the States with reference to intrastate commerce to those of the Federal Government with reference to interstate commerce when it declared that a State may not fix intrastate rates so low that a carrier's entire revenue from all its business in the State, interstate as well as intrastate, will not yield a fair net return upon the property employed by the carrier in doing such business.

§ 388. Shreveport Rate Case.

In Houston, E. & W. Texas R. Co. v. United States[5] the court again showed the superiority of the Federal rate-making authority with reference to interstate commerce over that of the States with reference to intrastate commerce. In this case, known as the Shreveport case, the court upheld an order of the Interstate Commerce Commission which had directed that intrastate rates maintained by a carrier under State authority should be changed to the extent necessary in order to prevent a result which, in the opinion of the Commission, operated as an unjust discrimination against interstate commerce.

Later cases, showing the extent to which the intrastate rate-making powers of the States must be exercised in subordination to the Federal power to regulate interstate commerce, are cited in the footnote.[6]

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[3] 169 U. S. 466.

[4] 230 U. S. 352.

[5] 234 U. S. 342.

[6] R. R. Commission of Wis. v. C. B. & Q. R. Co. (257 U. S. 563); Texas v. Eastern Texas R. Co. (264 U. S. 79); C. M. & St. P. R. Co. v. Public Utilities Com. (274 U. S. 344); Lancaster v. McCarty (267 U. S. 427); United States v. Village of Hubbard (266 U. S. 474); Colorado v. United States (271 U. S. 153); Board of Ry. Commrs. v. Great Northern Ry. Co. (decided May 19, 1930).

§ 389. Rate Regulation and the War Power.

It would appear that, when Congress is exercising its war powers, as distinguished from those derived from the Commerce Clause, the constitutional distinction between interstate and intrastate regulation disappears.[7]

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[7] Northern Pac. R. Co. v. N. Dakota (250 U. S. 135).

CHAPTER L

THE STATES AND FOREIGN CORPORATIONS ENGAGED IN INTERSTATE AND FOREIGN COMMERCE

§ 390. The States and Foreign Corporations Doing an Interstate and Foreign Commerce Business.

As has earlier appeared, the right to engage in interstate commerce, even if not of Federal creation, is one which is protected by the Constitution against State interference or control. As the court said in Vance v. Vandercook,[1] the right of the individual to import is "derived from the Constitution of the United States, and does not rest on the grant of the State law;" and, as declared in Delamater v. South Dakota,[2] no State can render illegal or in any way restrain the making of contracts by its residents with reference to interstate commerce.

Though not a "citizen" within the meaning of the provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States [3] a corporation is a person within the due process of law clauses of the Constitution, and possesses all the other Federal privileges and immunities which can attach to an artificial person. Among these is the right to engage in interstate commerce.

In Pensacola Telegraph Co. v. Western Union Telegraph Co.[4] it was established that a company chartered by the United States to do an interstate commerce business could not be prevented by a State from carrying on that business within its borders. With reference to the case of Paul v. Virginia the court observed that the corporation there involved was not engaged in interstate commerce and "enough was said by the court to show that if it had been, a very different question would have been presented." [5]

A State, though not able to exclude from its borders a Federally chartered corporation engaged in interstate commerce, is possibly not compelled to aid that corporation by granting to it any special privileges, such as the right of eminent domain. Congress may, however, endow such a corporation with the right of eminent domain, which right it may exercise within the States without their consent or against their will.[6]

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[1] 170 U. S. 438.

[2] 205 U. S. 93.

[3] Paul v. Virginia (8 Wall. 168).

[4] 96 U. S. 1.

[5] It may be said, generally, that a State cannot exclude a corporation in the employ of, or performing services for the Federal Government. Pembina Co. v. Penn. (125 U. S. 181); Postal Tel. Co. v. Adams (155 U. S. 688).

In Pembina C. S. M. & R. Co. v. Pennsylvania[7] a State law was upheld as to a foreign mining and milling corporation which assessed a license tax upon its offices in the State but which imposed no prohibition upon the transportation into the State of its products, or upon their sale within the State. However, in McCall v. California,[8] a State law was held invalid, as an interference with interstate commerce, which sought to impose a license tax upon an agent of an interstate railway company whose exclusive duty it was to solicit interstate passenger traffic over the road.

§ 391. What Constitutes "Doing Business" in the State.

It is often a very difficult matter to determine when a foreign corporation may be said to be "doing business" within the State, as a corporation, or simply engaged in individual, isolated, interstate commercial transactions in the State. The courts have not been able to lay down any general rule for determining this question, but have been compelled to decide each case upon its own merits or facts. In International Harvester Co. v. Kentucky[9] it was held that the continuous solicitation of orders through local agents, which orders were sent to another State to be filled and the articles ordered to be delivered within the State (the agents having authority to receive payments therefor) amounted to doing business in the State by a foreign corporation to the extent of authorizing the service of judicial process upon the corporation by service upon such agents, and that the corporation was not, by reason of being exclusively engaged in the State in interstate commerce, immune from service of process under the laws of the State. In Green v. Chicago, B. & Q. R. Co.[10] it had been held that a railway company was not "doing business" in the State, when, having its organization and tracks in another State, as incidental and collateral to its business proper, it solicited freight and passenger traffic in the State in question and employed an official for that purpose who had an office within the State. In its opinion in the International Harvester case the court pointed out that the case of Green v. Chicago, B. & Q. R. Co. was "an extreme case," and that the business shown therein as carried on by the railway company was in substance nothing more than solicitation. "In the case now under consideration," said the court, "there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check, or draft, and to take notes payable at banks in Kentucky." This is true, but an examination of all the facts in the two cases shows that the cases were distinguishable by no clear logical line. The difference was, after all, nothing more than one of degree.

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[6] Whether this right may be exercised with reference to land owned or already devoted to a public use by the State, is another question.

[7] 125 U. S. 181.

[8] 136 U. S. 104.

[9] 234 U. S. 579.

[10] 205 U. S. 530.

A corporation which transacts its business in a foreign State through a subsidiary company which it completely dominates, is not deemed to be doing business within that foreign State so as to render it subject to suit therein, where the subsidiary company does not act as its agent but buys the products of the foreign company, sells them to its customers, and keeps all transactions and accounts wholly separate from those of the foreign corporation.[11]

A corporation whose activities in a State do not extend beyond maintaining a local office from which it distributes dividends, elects officers, holds directors' meetings, and authorizes deeds to lands outside the State, cannot be said to be "doing business" in the State.[12]

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[11] Cannon Mfg. Co. v. Cudahy Pkg. Co. (267 U. S. 333).

[12] Cheney Bros. v. Massachusetts (246 U. S. 147).

CHAPTER LI

STATE TAXATION AND INTERSTATE COMMERCE

§ 392. Interstate Commerce May Not Be Taxed.

It has already been shown that the States are permitted, in the exercise of the powers reserved to them, substantially to affect interstate and foreign commerce, so long as this interference is an indirect, incidental one, the legislation in question a legitimate and *bona fide* exercise of a reserved power, and not in contravention to any existing Federal statute or regulation. This principle holds true with reference to the taxing powers of the States. A direct taxation of interstate or foreign commerce, that is, of the goods carried as exports or imports, of the agencies and instrumentalities of such commerce as such, or of the act of carrying on, or the right to engage in or to carry on, interstate and foreign commerce, is always construed as a direct regulation of, or interference with, such commerce, and, as such, beyond the power of the States.

A State cannot even enforce the collection of a valid tax by an injunction restraining a person or corporation from doing interstate commercial business.[1]

In Osborne v. Mobile [2] the court sustained a State tax which bore directly upon interstate commerce companies as such. The law in question in this case required every express or railroad company doing business in the city of Mobile and having a business extending beyond the limits of the State to pay a certain annual license fee. The court sustained the provision on the ground that there was no discrimination between the citizens of the State and the citizens of other States. However, in Moran v. New Orleans [3] this position was practically departed from, and, in Leloup v. Mobile,[4] the doctrine was absolutely and explicitly repudiated that any State tax, however indiscriminative, however light, or whatever its other features, can be valid which imposes a direct burden upon persons or corporations engaged in interstate commerce, or because of their being so engaged. The court, after a review of authorities, said: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and demands a regulation of it, which belongs solely to Congress."

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[1] Western Union Telegraph Co. v. Massachusetts (125 U. S. 530); Sprout v. City of South Bend (277 U. S. 163).

[2] 16 Wall. 479.

[3] 112 U. S. 69.

[4] 127 U. S. 640.

A State tax on wholesale and retail dealers the amount of which is based upon the volume of business was held in Crew Levick Co. v. Pennsylvania[5] to be an unconstitutional burden upon interstate and foreign commerce in so far as it was measured by the gross receipts from goods shipped out of the State or orders taken outside the State and sent direct to the dealer. That the law applied to internal as well as to foreign commerce, it was held, would not save it.[6] "That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

In Foote v. Stanley[7] it was held that interstate commerce was unconstitutionally burdened by a State tax, termed an inspection charge, levying one cent a bushel upon oysters coming into the State since the receipts from it would be largely in excess of the amount required to pay the salaries of inspectors.

In Wagner v. City of Covington[8] the court laid down the general doctrine that, in the testing the constitutional character of a State tax law, the court would not hold itself bound by the definition of the tax as declared by the State, but would be guided by its practical operation and effect as applied and enforced. In this case a State license tax was held illegal which was upon the business of itinerant venders of goods as carried on in the State and applicable alike to all such dealers irrespective of where the goods were manufactured and without discrimination against goods manufactured in other States.

In Air-Way Electric Appliance Corporation v. Day,[9] State franchise fees were held void, as applied to a foreign corporation doing interstate business, the amount of which was based on a charge on non-par common stock representing the corporation's property and business outside the State as well as on shares representing property and business within the State.[10] The court, in the course of its opinion, declared firmly established the doctrine that "A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located."

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[5] 245 U. S. 292.

[6] Citing State Freight Tax case (15 Wall. 232).

[7] 232 U. S. 494. See also Northwestern M. L. Ins. Co. v. Wisconsin (275 U. S. 136).

[8] 251 U. S. 95. *Cf.* New Jersey Bell Telephone Co. v. State Bd. of T. & A. (280 U. S. 338).

[9] 266 U. S. 71.

[10] The law was also held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, the classification provided for by it having no relation to its purpose. Franchise fees, it was declared, must have some relation to the value of the privilege for which they are imposed.

In New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment[11] it was held that a State tax, purporting to be a franchise tax on persons or companies using, or having the right to use public streets or highways, based upon such proportion of their gross receipts of their business within the State as the length of their lines or mains in the streets or highways might bear to their whole lines or mains, requiring all real and personal property to be taxed by districts at local rates according to value, and declaring that such declared franchise tax should be in lieu of all other franchise taxes, was, in fact, not a tax on property, nor in lieu of such a tax, but was a license tax, and, as such, a violation of the Commerce Clause in so far as based upon gross receipts from interstate commerce.

Had the tax in the foregoing case been deemed to be, essentially, a property tax, it would have been upheld.[12]

In Hope Natural Gas Co. v. Hall [13] it was held that interstate commerce was not unconstitutionally burdened by a State tax on producers of natural gas reckoned according to the value of the gas at the well, and before it had entered into interstate commerce.[14]

Other cases dealing with this general subject are: Baltic Mining Co. v. Massachusetts,[15] New York *ex rel.* Cornell Steamboat Co. v. Sohmer,[16] Texas Co. v. Brown,[17] Postal Telegraph Cable Co. v. City of Fremont,[18] Western Union Telegraph Co. v. Kansas,[19] Pullman Co. v. Kansas,[20] Ludwig v. W. U. Telegraph Co.,[21] Southern Railway Co. v. Greene [22] and Ozark Pipe Line Corp. v. Monier.[23]

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[11] 280 U. S. 338.

[12] For a recent case as to this, see Great Northern R. Co. v. Minnesota (278 U. S. 503).

[13] 274 U. S. 284.

[14] *Cf.* Am. Mfg. Co. v. St. Louis (250 U. S. 459); Heisler v. Thomas Colliery Co. (260 U. S. 245); Oliver Iron Mining Co. v. Lord (262 U. S. 172).

[15] 231 U. S. 68.

[16] 235 U. S. 549.

[17] 258 U. S. 466.

[18] 255 U. S. 124.

[19] 216 U. S. 30.

[20] 216 U. S. 56.

[21] 216 U. S. 146.

[22] 216 U. S. 400.

[23] 266 U. S. 555.

§ 393. States, in Levying Taxes, May Not Discriminate Against Interstate Commerce.

The States may not, by their tax laws, or, indeed, in any other manner, discriminate against interstate commerce; that is, against persons or corporations engaged in interstate commerce, against the property employed in, or the receipts from, interstate commerce, or against the commodities carried therein.

In Ward v. Maryland [23a] the court held void, because discriminatory, a State law by which persons not permanent residents in the State were prohibited from selling or offering for sale within a certain district of the State, any goods whatsoever other than agricultural products and articles manufactured in the State.

In Welton v. Missouri[23b] the same doctrine was declared, the court saying: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it even after it has entered the State, from any burdens imposed by reason of its foreign origin." [24]

§ 394. Drummers and Other Sales Agents.

The leading case establishing the doctrine that the negotiation by sales agents of sales of goods which are in another State for the purpose of introducing them into the State where the negotiation is had, is interstate commerce and not subject to regulation or taxation by the State, is Robbins v. Taxing District of Shelby Co.[25]

In Ficklen v. Shelby Co.[26] the doctrine was again asserted but declared not applicable to a license tax imposed upon a citizen doing a general commission business, though he was able to show that during the year for which he resisted the payment of the tax his commissions were wholly derived from interstate business, that is, orders taken for goods to be shipped into the State. The court argued that this was an adventitious circumstance, and that, having taken out a license to do a general commission business, and having agreed to pay a percentage thereon, the tax was to be construed as a general license tax and not one on interstate business. In a later case, the court, however, recognized that this case was on the boundary line of the States' power.[27]

[23a] 12 Wall. 418.

[23b] 91 U. S. 275.

[24] For other cases, see Guy v. Baltimore (100 U. S. 434); Webber v. Va. (103 U. S. 334); Walling v. Mich. (116 U. S. 446); Darnell & Son v. Memphis (208 U. S. 113); Minn. v. Barber (136 U. S. 313); Brown v. Md. (12 Wh. 419).

[25] 120 U. S. 489. See also Asher v. Texas (128 U. S. 129); and Brennan v. Titusville (153 U. S. 289).

[26] 145 U. S. 1.

[27] Brennan v. Titusville (153 U. S. 289).

In Stockard v. Morgan[28] a privilege tax imposed by a State upon merchant brokers whose business was exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agent for non-resident parties, for goods to be shipped into the State by such parties, was held void as laying a burden upon interstate commerce.[29]

In Norfolk W. R. Co. v. Sims [30] a license tax imposed by a State upon all persons engaged in selling sewing machines in the State was held void as applied to the sale of machines shipped into the State upon the written order of a customer under an ordinary C. O. D. consignment.[31]

§ 395. Peddlers.

As has been earlier seen, when property which has been introduced into a State has become commingled with the other property of that State, it ceases to enjoy the protection of the Commerce Clause. And thus it has been held that peddlers, as distinguished from drummers, that is, persons who carry with them the articles which they sell, or at least supply the article sold from stocks of merchandise already in the State, may be required to pay a license fee, even though they deal exclusively with goods which have been imported from another State; provided, however, of course, that they are not discriminated against because of the fact that they sell goods brought in from outside the State.[32]

§ 396. Taxation of Foreign Corporations.

The property of foreign corporations may be taxed as such by the State in which the property is situated. Ordinarily, taxes, other than the ordinary property taxes, imposed on foreign corporations as such are explicitly or are construed to be in the nature of license taxes. Such license taxes may, however, be imposed only in case the corporations may fairly be said to be "doing business" within the State. This is a fact which the courts, when appealed to, must determine in each case. It may be said, generally, however, that a corporation cannot be said to be "doing business" in the State unless it has established a trade domicile of some sort, that is, established a branch office, or created a sales agency, a factory, or a distributing warehouse.

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[28] 185 U. S. 27.

[29] See also Caldwell v. N. Carolina (187 U. S. 622).

[30] 191 U. S. 441.

[31] See also Adams Exp. Co. v. Iowa (196 U. S. 147); and Rearick v. Penn. (203 U. S. 507).

[32] Machine Co. v. Gage (100 U. S. 676); Emert v. Missouri (156 U. S. 296); Banker Brothers v. Penn (222 U. S. 210); Crenshaw v. Arkansas (227 U. S. 389); Real Silk Hosiery Mills v. Portland (268 U. S. 325); Stewart v. Mich. (232 U. S. 665); Browning v. Waycross (233 U. S. 16); Singer Sewing Machine Co. v. Brickell (233 U. S. 304).

If, however, the foreign corporation be a carrier carrying on interstate commerce, as, for example, a railroad or telegraph or telephone company, it may establish offices or other agencies for the transaction of its business within the State, free from liability to a license tax or other burden or restraint by the State. Thus, in McCall v. California[33] a State law was held void under which it was attempted to collect a license tax upon agents soliciting passenger business for certain interstate railroads.

The sending by a foreign corporation of agents through the State for the purpose of taking orders for goods, which goods are to be later shipped into the State, is an interstate commerce transaction, and does not constitute "doing business" in the State, so that a license tax may be imposed.[34]

In order that a State license tax may be valid, it must clearly appear that the tax is exclusively upon the local business, and that its payment is not a condition precedent to the transaction of interstate business. And, furthermore, if the tax, whatever its name, amounts to more than an ordinary tax upon the property of the company doing both an interstate and domestic business, it will be held void.[35]

In Cudahy Packing Co. v. Hinkle,[36] it was held that the exaction of a license fee from a foreign corporation doing an interstate commerce business, based upon its authorized capital stock, by a State in which only a small part of the corporation's property was located, and in which only a relatively small proportion of its business was transacted, was invalid as an interference with interstate commerce.

The exaction by a city of a tax on the poles of a telegraph company, doing an interstate commerce business, has been held to be not a license tax on the interstate commerce, but a rental for the use by the company of the city streets.[37] Such a tax, however, the court pointed out, may not be unreasonable in amount.[38]

§ 397. State Taxation of Articles of Commerce.

In Brown v. Maryland,[39] decided in 1827, it had been held that a State law requiring all importers of foreign goods, and others selling the same by wholesale to pay a license fee was repugnant to the Commerce Clause.[40] A tax on the sale of an imported article was declared to be a tax on the article itself; and a tax on the importer a tax on the business of importing.

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[33] 136 U. S. 104.

[34] See N. Y. *ex. rel.* Hatch v. Reardon (204 U. S. 152); Ware and Leland v. Mobile County (209 U. S. 405); New York v. Latrobe (279 U. S. 421); International Shoe Co. v. Shartel (279 U. S. 429).

[35] Postal Tel. Cable Co. v. Adams (155 U. S. 688).

[36] 278 U. S. 460.

[37] St. Louis v. Western Union Tel. Co. (148 U. S. 92).

[38] *Cf.* W. U. Tel. Co. v. Borough of New Hope (187 U. S. 419), in which it was held that an ordinance imposing a license fee on telegraph poles was not void because it yielded a return in excess of amount necessary to meet the cost of supervision and inspection.

[39] 12 Wh. 419.

In Woodruff v. Parham [41] the doctrine declared in Brown v. Maryland was declared applicable only to imports from foreign countries. As to these it was declared the States might not exercise their taxing powers until, by the breaking of the original package, or sale by the importer, they had become commingled with the general goods of the States. This limitation upon the taxing power of the States was deduced from the constitutional prohibition as to the levying of export or import duties.

As to goods brought into the State from other parts of the United States, however, it was held that this constitutional prohibition did not apply, the terms export and import duties being declared to relate to foreign commerce only. And as to the Commerce Clause it was held that so long as the articles brought in are not discriminated against, no interference with interstate commerce is caused by their taxation, even in their original packages and unsold in the hands of the original consignee.

It will thus be seen that though the States may not, without the permission of Congress, extend the authority of their police regulations over articles of interstate commerce so long as they remain unsold and in their original packages in the hands of their original consignees, the law is otherwise as regards the taxing power. The distinction in favor of the taxing power is, according to the argument of the court in Woodruff v. Parham drawn from the consequences that would follow from an adoption of a contrary position, and from the purpose of the Commerce Clause in the minds of the framers of the Constitution, as shown in the historical records that have come down to us.

§ 398. State Taxation of Goods in Transit.

A difficulty which has not infrequently arisen with reference to the amenability of articles of interstate commerce to State taxation is the question when an article may fairly be said to be *in transitu* and when it may be said to have obtained a taxable *situs* in the State. That an article actually in transit from one State to another is not taxable by a State is admitted. That an article manufactured for interstate trade and intended to be sent outside the State, but its transportation thither not yet begun, is taxable in the State where located, is equally well established.

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[40] And also that it was repugnant to the clause prohibiting the States from levying duties on exports and imports.

[41] 8 Wall 123.

In Coe v. Errol [42] the question was as to the taxation of certain logs cut in the State and drawn to another place in the State, whence they were to be floated down stream to a place outside the State. Because of low water they had not yet started upon this interstate portion of their trip. The logs were held taxable, the court thus fixing the doctrine that articles deposited or stored at an *entrepôt* for future interstate transportation are taxable by the State in which they are situated.

In Diamond Match Co. v. Ontonagon,[43] however, it was held that logs cut and floated down a stream to a boom or sorting gap, from which they were to be shipped by rail outside the State, were, while awaiting delivery to the railroad, *in transitu* and not subject to State taxation.

In Kelley v. Rhoads [44] it was held that sheep while being driven across the State of Wyoming, to the State of Nebraska at the rate of about nine miles a day, were exempt from taxation under a Wyoming law authorizing the taxing of live stock brought into the State for grazing purposes, although the sheep were permitted, incidentally, while in transit, to support themselves by grazing.[45]

§ 399. State Taxation of Persons in Transit.

The right of persons to travel from State to State,[46] though apparently not strictly upheld during the early years of the Constitution,[47] has been, since the middle of the last century, well established. Though questioned and not clearly sustained in New York v. Miln,[48] and the License Cases,[49] it was definitely declared in the Passenger Cases,[50] decided in 1848, that the carrying of persons is commerce, and, therefore, that their travel from State to State is protected by the Commerce Clause from State interference. Also in Crandall v. Nevada,[51] decided in 1868, the right was held to be one which attaches to Federal citizenship and, therefore, one protected from State interference independently of the Commerce Clause.

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[42] 116 U. S. 517.

[43] 188 U. S. 82.

[44] 188 U. S. 1.

[45] See also Am. Steel & Wire Co. v. Speed (192 U. S. 500); Bacon v. Illinois (227 U. S. 504); Susquehanna Coal Co. v. Smith Amboy (228 U. S. 665); Champlain Realty Co. v. Town of Brattleboro (260 U. S. 366).

For an excellent discussion of this subject, see the series of articles entitled "Taxation of Things in Transit" by Professor T. R. Powell, in VII *Virginia Law Review*, pp. 167, 245, 429 and 497.

[46] Subject, of course, to necessary quarantine provisions.

[47] *Cf.* Prentice and Egan, *Commerce Clause*, pp. 212ff.

[48] 11 Pet. 102.

[49] 5 How. 504.

[50] 7 How. 283.

[51] 6 Wall. 35.

In Henderson v. Mayor of New York,[52] and People v. Compagnie Générale Transatlantique,[53] State taxation of immigrants from foreign countries was declared unconstitutional, the validity of the laws not being saved by terming them police or inspection regulations.

§ 400. Taxation of Property of Interstate Carriers.

The right of the States to tax property, as such, of companies doing an interstate commerce business, is determined by the same principles as those stated in Union Pacific R. R. Co. v. Peniston [54] with reference to the taxation by the States of Federal agencies, namely, that "State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of this power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of Federal powers." [55]

§ 401. Assessment of Property of Interstate Carriers for Purposes of State Taxation.

In Henderson Bridge Co. v. Kentucky [56] it is held that, in assessing for taxation the property of a bridge company owning and operating a bridge across the Ohio river, connecting the shores of Kentucky and Indiana, the value of the franchise granted by the taxing State might be included as intangible property, and that the value of this franchise might be estimated by taking the total value of the entire property and subtracting therefrom the value of the tangible property in the taxing State and the value of all the property, tangible and intangible, in the other State.[57]

In Keokuk, etc., Bridge Co. v. Illinois [58] it was held that a State tax on the capital stock of a bridge company consolidated from corporations of different States, which maintained an interstate bridge, was not a tax on a franchise conferred by the Federal Government, although the corporation had an authority under an act of Congress to construct the bridge. Also that such a tax was not a taxation of interstate commerce, because the bridge company did not itself transact any interstate business over it.

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[52] 92 U. S. 259.

[53] 107 U. S. 59.

[54] 18 Wall. 5.

[55] See Postal Tel. Cable Co. v. Adams (155 U. S. 688).

[56] 166 U. S. 150.

[57] Four justices dissented.

[58] 175 U. S. 626.

§ 402. Taxation of Franchises as Property.

"The franchise, as it may be termed, of being a corporation is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. The right of the States to thus tax it has been recognized by this court and the State courts in instances without number." [59]

That this right upon the part of the States to tax, as personal property, the franchises of foreign corporations doing business within the State, even though those corporations be exclusively engaged in interstate commerce, and that this tax may be exacted as a condition precedent to allowing the corporations to do an intrastate business, would seem to be well established. It is equally well established that such a tax upon the franchise of a foreign corporation doing business in the State is not in violation of the Fourteenth Amendment to the Federal Constitution as an attempt to tax property beyond the jurisdiction of the State. The *res* taxed is the right of acting as a corporation in the State.[60]

In determining for purposes of taxation the amount of rolling stock of an interstate carrier, it has been held that a State may ascertain the average number of cars continuously employed in the State, though no particular car may in fact be kept permanently employed in the State.[61]

When valuing the property of carrier companies whose property extends over several States, each State is permitted to tax the amount of property within its own limits and to give to that amount a value bearing the same proportion to the value of the entire property of the company as the length of railway or telegraph or telephone line bears to the total length of the carrier system which is assessed. This, the court declared proper in W. U. Telegraph Co. v. Mass.[62] and again in Pullman Palace Car Co. v. Pennsylvania,[63] in the latter case saying that the method "was a just and equitable method of assessment, and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole of its capital stock and no more."

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[59] Horn Silver Mining Co. v. New York (143 U. S. 305).

[60] St. Louis S. W. R. Co. v. Arkansas (235 U. S. 350).

[61] Pullman Palace Car Co. v. Penn. (141 U. S. 18); Union Refrigerator Transit Co. v. Ky. (199 U. S. 194); American Refrigerator Transit Co. v. Hall (174 U. S. 70).

[62] 125 U. S. 530.

[63] 141 U. S. 18.

The court has, however, pointed out that this method of assessment is after all but a convenient one applicable in some cases, and that it is not to be erected into an absolute principle; for it might not be acceptable in those cases where it would work obvious injustice. An example of this would be where a railroad company has a large mileage in one State, but over land where construction expenses were inexpensive, and where terminal facilities are few and not costly, while in another State its mileage is small, but of expensive construction, and its terminal facilities elaborate and costly.[64]

The chief constitutional objection to this method of valuation has been that the value of the property is based in very great degree upon its use as an instrument of interstate commerce, and that, therefore, a tax assessed upon this value is, in effect, a tax upon that commerce. This contention was urged with especial force, but without success, in the case of Adams Express Co. v. Ohio.[65]

In the Express Company case was established what is known as the "unit of use" rule, according to which the property of a company may be determined as a unity, if used as a single system, and that its value may be assessed for purposes of taxation at the value which, as such a unity, it has in use, namely, the net profits which it produces, and irrespective of what may be the value of the tangible property which is owned or employed; and that where this system extends into two or more States each State may, for purposes of taxation, consider as within its borders, an amount of property proportioned to the whole, as the amount of business done within the State is proportioned to total amount of business done.[66]

In Union Tank Line Co. v. Wright[67] the "Unit Rule" of assessment for taxation of the property of foreign corporations was again examined as applied to the cars of a tank company used for transporting oil in interstate commerce. By the State law involved, the value of the cars to be assessed was obtained by taking a sum bearing the same ratio to the value of all the cars of the company that the miles of railroad in the State over which the cars moved bore to the total mileage traversed by the cars in all the States in which they were moved. This mode of assessment, the Supreme Court held, resulted in such a gross overvaluation as to render the tax illegal both as a violation of due process of law and as an undue burden upon interstate commerce. The Unit Rule itself, however, as a constitutional one, when justly and properly applied, the court reaffirmed.[68]

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[64] Pittsburg, etc., R. Co. v. Backus (154 U. S. 421).

[65] 165 U. S. 194.

[66] In Fargo v. Hart (193 U. S. 490) the court held that personal property owned by a non-resident express company and situated outside of the State, could not be taken into account in fixing the value, for taxation, of its property within the State, on the theory that the possession of such property by the company gave to it a better credit and thus a better opportunity to obtain business.

[67] 249 U. S. 275.

In Wallace v. Hines[69] it was again held that a State could not, consistently with either the Fourteenth Amendment or the Commerce Clause, fix, for the purpose of taxation, the value of a foreign interstate railway property by taking the total value of its stock and bonds and assessing a proportion of this value equal to the proportion borne by the main track mileage of the company in the State to its whole mileage, if by reason of topographical and other conditions the cost of the trackage was less than it was in other States.

§ 403. Vessels.

Vessels, for the purposes of taxation, have, generally speaking, their *situs* at their home ports, that is, where registered, irrespective of where they are operating as carriers. When, however, it appears that a boat is permanently located in a State, other than the one of registry, and doing business there, it may be taxed by that State.[70]

§ 404. The Measurement of Value of Property Employed in Interstate Commerce by the Receipts Therefrom.

That a tax directly upon the receipts from interstate commerce operates as a burden upon that commerce and is therefore invalid, there is, and has been, no doubt.[71] However, it has been held that the States may use gross revenues from interstate commerce as a means of measuring the amounts of taxes which, in themselves, are valid.

The cases establishing and applying this general doctrine are not easy to harmonize, and, in fact, the doctrine is not itself in as definite a form as might be desired. One general principle may, however, be deduced from the cases. This is, that a State tax is invalid, whatever its form, if, in effect, it lays a direct burden upon interstate commerce; and that, conversely, a State tax is valid, however measured, or (if we follow the doctrine of Maine v. Grand Trunk Ry.)[72] whatever its form, which may be fairly held to be a tax on the property of the company, whether tangible or intangible. The tax being thus valid, if valid at all, only as a property tax, it may never amount to more than an ordinary property tax, and its non-payment may never involve a forfeiture of the right of the company to do an interstate commerce business. The doctrine of Maine v. Grand Trunk Ry. that a tax measured by the gross receipts may be sustained as a franchise or excise tax upon the right of the company to do business in the State is certainly unsound, and was, it would appear, as above indicated, so recognized by the court in Galveston H. & S. A. R. R. Co. v. Texas.[73]

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[68] Justices Pitney, Brandeis and Clarke dissented upon the ground that, in their opinion, the mode of assessment was not an arbitrary or unreasonable one.

[69] 253 U. S. 66.

[70] Northwestern Lumber Co. v. Chehalis County (54 L. R. A. 212); Ayer & Lord Co. v. Kentucky (202 U. S. 409).

[71] Western Union Tel. Co. v. Texas (105 U. S. 460); Fargo v. Mich. (121 U. S. 230); Phila. & S. M. SS. Co. v. Penna. (122 U. S. 326); Western Union Tel. Co. v. Alabama Bd. of Assessment (132 U. S. 472); Galveston H. & S. A. R. R. Co. v. Texas (210 U. S. 217); Crew Levick v. Penna. (245 U. S. 292).

[72] 142 U. S. 217.

§ 405. State Taxation of Net Income from Interstate Commerce.

It is established that, with reference to the taxing powers of the States, a distinction is to be made between net and gross incomes derived from interstate commerce. Thus, it is undoubted that, provided there is no discrimination against interstate as compared with intrastate commerce, a State may, under a general income tax, include net income derived from interstate commerce, the reason for this permission being that, in this respect, the net income and property of companies doing the interstate commerce business stand upon the same footing.[74]

The application of the foregoing reasoning to the levying of taxes upon net incomes derived from interstate and foreign commerce is evident.[75]

§ 406. Taxation of Capital Stock of Interstate Commerce Companies.

Because of the control which a State has over corporations of its own creation, it is held that it may tax the entire capital stock of domestic corporations doing an interstate commerce business even though some of the property of those corporations is situated outside of the taxing State, when such a tax can be held to be not upon the property which in large measure gives the value to the capital stock, but upon the corporation as an entity, over which entity the State has full personal jurisdiction. The same rule has been applied to foreign corporations which have been permitted to consolidate with and thus become constituent elements of domestic corporations.[76]

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[73] 210 U. S. 217. See also Postal Tel. Cable Co. v. Adams (155 U. S. 688); Meyer v. Wells, Fargo & Co. (223 U. S. 298); Cudahy Packing Co. v. Minn. (246 U. S. 450); Pullman Co. v. Richardson (261 U. S. 330).

[74] United States Glue Co. v. Oak Creek (247 U. S. 321). See also Crew Levick v. Penn. (245 U. S. 292); Peck & Co. v. Lowe (247 U. S. 165).

[75] Shaffer v. Carter (252 U. S. 37); Atlantic Coast Line R. Co. v. Daughton (262 U. S. 413); Underwood Typewriter Co. v. Chamberlain (254 U. S. 113); and Bass, Ratcliff & Gretton v. State Tax Association (266 U. S. 271).

[76] Ashley v. Ryan (153 U. S. 436); The Delaware Railroad Tax (18 Wall. 206); State Railroad Tax cases (92 U. S. 575).

As to foreign corporations doing an interstate commerce business it is held that their capital stock may be taxed only to the extent that such corporations have property within the taxing States. This doctrine has not been questioned since the decision of Gloucester Ferry Co. v. Pennsylvania.[77]

The theory of these cases has been that, since it is within the absolute right of the State to create or decline to create the corporations concerned, it may tax the legal entities of its own creation.[78]

§ 407. License Taxes on Foreign Corporations Doing Both Intrastate and Interstate Business.

The right of the States to levy taxes in the nature of license taxes upon foreign corporations doing both an intrastate and interstate business, and the manner in which the amounts of these taxes may be measured have given rise to a considerable number of cases in the decision of which the Supreme Court has found no little difficulty in pursuing a consistent course of judicial reasoning.[79]

It is incontestable that foreign corporations may carry on an intrastate commerce business only with the consent, express or implied, of the States concerned. Predicated upon this fact, the States have claimed the right to levy license fees upon the granting or continuing of the enjoyment of this right, and that the amount and modes of measuring these fees are within their discretion.

In Leloup v. Mobile [80] the court declared invalid a general license tax on a foreign telegraph company on the ground that it affected its entire business, interstate as well as intrastate. It appears, however, that, in this case, no attempt was made to defend the tax upon the ground that it was levied upon the right of the company to do an intrastate business in connection with its interstate business. The tax was viewed as a general license tax upon the right of the company to do any business whatever within the State, and thus, as the court said, the question was squarely presented to it, whether a State, as a condition to doing business within its jurisdiction, might exact a license tax from a telegraph company, a large part of whose business was interstate in character.

However, in Osborne v. Florida,[81] the court upheld a State license tax, which, as construed by the State court, applied only to companies which should engage in business of an intrastate character. The company concerned in this case was an express company and it was feasible for it to carry on its interstate business without engaging in a "local" or intrastate business.

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[77] 114 U. S. 196.

[78] Delaware Railroad Tax (18 Wall. 206).

[79] See especially the series of acute articles by Professor T. R. Powell which appeared in vols. XXXI and XXXII of the *Harvard Law Review*, under the title "Indirect Encroachments on Federal Authority by the Taxing Powers of the States."

[80] 127 U. S. 640.

[81] 164 U. S. 650.

Other cases dealing with various phases of this topic are cited in the footnote.[82]

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[82] Pullman Co. v. Adams (189 U. S. 420); Allen v. Pullman's Palace Car Co. (191 U. S. 171); W. U. Tel. Co. v. Kansas (216 U. S. 1); Pullman Co. v. Kansas (216 U. S. 56); Ludwig v. W. U. Tel. Co. (216 U. S. 146); Atchison T. & S. F. R. Co. v. O'Connor (223 U. S. 280); Baltic Mining Co. v. Mass. (231 U. S. 68); St. Louis S. W. R. Co. v. Ark. (235 U. S. 350); Kansas City, etc., R. Co. v. Botkin (240 U. S. 227); Looney v. Crane Co. (245 U. S. 178); Alpha Portland Cement Co. v. Mass. (268 U. S. 203); Western Cartridge Co. v. Emmerson (decided May 19, 1930).

CHAPTER LII

BANKRUPTCY, COINAGE, WEIGHTS AND MEASURES

§ 408. Bankruptcy: Definition of.

The Constitution gives to Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States."

The construction which has been given to this clause furnishes one of the few exceptions to the general rule that the technical terms of the Constitution are to be given the meanings which they had at the time the Constitution was adopted. In 1789 "bankruptcy" and "insolvency" had, in the English law, different and distinct meanings. Bankruptcy applied only to merchants or traders charged with having committed some fraudulent or *quasi*-fraudulent act upon their creditors, who thereupon might institute proceedings to have their debtor declared a bankrupt, his property taken and distributed in payment of his debts, and he himself either discharged from further liability therefor, or imprisoned as the court might think fit. Insolvency, upon the other hand, described the status of a debtor, not a trader, who, in order to obtain a discharge might in certain cases surrender, or offer to surrender, all his property in payment of his debts.

In this country, however, from the beginning Congress and the Supreme Court have given to the term "bankruptcy" a meaning broad enough to cover "insolvency" as well. Indeed no distinction between the two was recognized in the colonies before the separation from England.[1]

By various acts Congress has, from time to time, enacted laws providing for both voluntary and involuntary bankruptcy, that is, for proceedings instituted by the debtor himself or *in invitum* by his creditors. The details of this legislation need not be here given. It is sufficient to say that the first law was enacted in 1800, and repealed in 1803; the second law in 1841 and repealed in 1843; the third in 1867, and after being several times amended, repealed in 1878; the fourth law, now in force as amended, being passed July 1, 1898.

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[1] Story, *Commentaries*, Ch. VI. In Sturges v. Crowninshield (4 Wh. 122), Marshall said: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." See Hanover National Bank v. Moyses (186 U. S. 181), in which the authorities on this point are reviewed.

§ 409. Federal Power Not Exclusive.

In Sturges v. Crowninshield,[2] affirmed in Ogden v. Saunders,[3] the court held that the power to establish bankruptcy laws is not exclusively vested in Congress, but may be exercised by the States in the absence of Federal legislation.

§ 410. State Bankruptcy Laws and the Obligation of Contracts.

The right of the States, in the absence of conflicting congressional legislation, to enact bankruptcy laws is limited by the provision of the Constitution that no State shall pass any law impairing the obligation of contracts. Indeed, if we are to accept the statement of the court in Hanover v. Moyses[4] this prohibition was made for this express purpose.[5]

In Sturges v. Crowninshield the court held invalid a State law which discharged the debtor from a contract entered into previous to its passage.

In Ogden v. Saunders the court held valid a State bankruptcy law which discharged the debtor and his future acquisitions of property so far as it related to debts contracted subsequent to the passage of the law. The law was thus, in effect, read into each contract as a clause thereof.[6]

The authority of the States to deal by bankruptcy or other laws with contracts entered into subsequent to their enactment is plenary. "The inhibition of the Constitution [as to the impairment of contracts] is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect."[7] Thus the States have been permitted to exempt at will from execution, or from attachment and distribution under bankruptcy proceedings, such classes and amounts of the debtor's property as they may see fit.

§ 411. State Bankruptcy Laws Have no Extraterritorial Force.

In Ogden v. Saunders[7a] was laid down the important principle that a certificate of discharge under a State law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The creditor of another State is, however, concluded by the discharge in bankruptcy if, by appearance or otherwise, he has made himself a party to the original insolvency proceedings.

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[2] 4 Wh. 122.

[3] 12 Wh. 213.

[4] 186 U. S. 181.

[5] The court said: "As the States, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it, the limitation was imposed on the States that they should pass no 'law impairing the obligation of contracts.'"

[6] Edwards v. Kearzey (96 U. S. 595).

[7] See, for example, Denny v. Bennett (128 U. S. 489).

[7a] 12 Wh. 213.

It is thus seen that the power of the States in the matter of bankruptcy does not extend to an absolute release of the debtor from the obligation of his contracts. "The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court." [8]

The United States is, of course, not under this territorial limitation in the exercise of its bankruptcy powers, and, furthermore, it is not limited with reference to the impairment of the obligation of contracts. National bankrupt laws may, therefore, be made applicable to contracts already entered into at the time of their passage.[9]

§ 412. Uniformity.

It is, however, required of National bankrupt laws that they shall be uniform. The uniformity is a geographical one. The laws must, in all their provisions, be equally applicable to all of the States, and to incorporated territories.[10]

By Section 6 of the act of 1898 it is provided that: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." A somewhat similar provision appeared in the act of 1867. These exemptions, the character and amount of which are thus made dependent on State laws, have been held not to destroy that geographical uniformity which the Constitution requires.[11]

In Hanover Nat. Bank v. Moyses, the court declared: "We . . . hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee [under the Act of 1898] takes in each State whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different

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[8] Denny v. Bennett (128 U. S. 489). See also Brown v. Smart (145 U. S. 454).

[9] *In re* Klein (1 How. 277, note); Hanover Nat. Bank v. Moyses (186 U. S. 181).

[10] *Quære* as to unincorporated territories.

[11] Nor to violate the principle that Congress may not delegate legislative power to the States. Hanover Nat. Bank v. Moyses (186 U. S. 181).

States." In this same case it was held that provisions for voluntary proceedings in bankruptcy are not in violation of the due process of law clauses of the Fifth and Fourteenth Amendments, even when, as in the act of 1898, there is no requirement as to personal notice to creditors of the filing of the petition.

§ 413. State Laws Suspended but Not Annulled by Federal Bankruptcy Law. Effect of the Law of 1898.

The enactment of a National bankrupt law does not operate to annul State laws on the same subject, but simply to suspend their operation so long as the National regulations are in force. Upon the repeal of the Federal law the State laws at once revive, and do not need reënactment.[12] So also a State law passed while a Federal bankruptcy law is in force goes at once into force with the repeal of the Federal statute.[13]

The precise effect of the enactment of a Federal bankruptcy law in suspending the operation of existing State laws is not definitely determinable from the decisions of either the State or Federal courts. That a State law covering the same ground as the National act, even though its provisions be not inconsistent therewith, is suspended is generally, though not uniformly, admitted.[14] If, then, it be conceded that the intention of Congress was, by the enactment of a bankrupt law, to cover the entire subject, all State laws relating to bankruptcy are suspended while the National law remains in force.

Even if the view be accepted that by the act of 1898 the general subject of bankruptcy is fully covered there still remains, in many cases, the difficulty of determining when State laws relating to general assignments for the benefit of creditors, receivership of corporations, etc., may be held to be in the nature of bankruptcy laws and as such rendered inoperative during the existence of the Federal law.

Coinage and Standards of Weights and Measures

§ 414. Coinage.

Congress is given power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The authority thus given has been freely exercised by Congress but this legislation has given rise to very few constitutional questions.

It is to be observed that power is to be given not only to coin, but to provide what shall be the legal tender value of the pieces coined. There has been no question but that the States possess no concurrent jurisdiction. The power is an exclusively Federal one.[15]

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[12] Butler v. Goreley (146 U. S. 303).

[13] Palmer v. Hixon (74 Me. 447).

[14] Tua v. Carriere (117 U. S. 201). See also authorities cited by Professor Williston in article "The Effect of a National Bankruptcy Law upon State Laws," in *Harvard Law Review*, XXII, 547.

§ 415. Weights and Measures.

With reference to standards of weights and measurements, the rule is otherwise, the States being recognized to have power to legislate in the absence of congressional action.

COUNTERFEITING

§ 416. Counterfeiting.

Congress is expressly given the power "to provide for the punishment of counterfeiting the securities and current coin of the United States." There is little doubt, however, that, had the power not been expressly given, it would have been held implied in the power given to coin. The power of Congress to prohibit and to provide punishment for the counterfeiting of the coins and securities of foreign countries is considered elsewhere.[16]

§ 417. The Passing and the Uttering of Counterfeit Coins Distinct Offences.

The passing of counterfeit coins or securities is an offence distinct from that of coining or "uttering" them, but the power to punish the former is implied in the authority to forbid the latter.

With reference to this distinction between the uttering and the passing of counterfeit currency, the court in Fox v. Ohio [17] said: "The former is an offense directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely if it will in any degree, be reached. . . . The punishment of a cheat or a misdemeanor practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable."

Under its powers to regulate commerce and to punish counterfeiting, Congress has been held to have the power to provide punishment for the bringing into the United States, with intent to pass the same, false, forged or counterfeit coin, as well as for the passing or uttering of the same.[18]

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[15] By Section 10, Clause 1, of Article I, the States are expressly denied the power to coin money.

[16] See § 61.

[17] 5 How. 410, 433.

[18] United States v. Marigold (9 How. 560).

In Fox v. Ohio[19] it was held that the grant of power to the United States to punish the uttering and passing of counterfeits of its coins did not deprive the States of the power to render penal and to punish these acts. It was pointed out by the court that the same act thus might constitute as to its character and consequences an offence against both the State and Federal Governments. This doctrine was approved in United States v. Marigold.

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[19] 5 How. 410.

CHAPTER LIII

THE POSTAL POWER [1]

§ 418. Federal Power.

The Federal control of the postal service is granted in the clause of Article I, Section 8 which provides that Congress shall have the power "to establish post-offices and post-roads." "No other constitutional grant," as Pomeroy observes,[2] "seems to be clothed in words which so poorly express its object, or so feebly indicate the particular measures which may be adopted to carry out its design. To establish post-offices and post-roads, is the form of the grant; to create and regulate the entire postal system of the country is the evident intent."

Aside from the express grant of the power to establish post-offices and post-roads, it would seem that Congress would have the power to control the mails, between the States at least, as incidental to the regulation of commerce. In the Pensacola Telegraph Co. v. Union Telegraph Co.[3] it was held that the transmission of telegraphic messages is not only commerce and as such, when interstate, subject to congressional regulation, but is an operation that may fairly be brought under the power to establish post-roads.

In early years the view was maintained by some that by this grant Congress was given the power only to designate the routes over which the mails should be carried, and the post-offices where they should be received and distributed, and to exercise the necessary protection in relation thereto, and that it did not provide the authority to construct and operate agencies for the carrying and distributing of mails. This was substantially the view taken by Monroe in the paper sent to Congress in connection with his veto of May 4, 1822, of the Cumberland Road Bill.

§ 419. Federal Power to Provide Postal Agencies.

In considerable measure Congress has in its legislation kept within the limits of the power conceded to it by Monroe, but, when it has thought it wise, it has not hesitated to overstep them, and its constitutional right so to do has for years been conceded.[4]

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[1] For an able comprehensive study of this power, see the monograph of Professor Lindsay Rogers entitled "The Postal Power of Congress," published in the *Studies in Historical and Political Science*, vol. XXXIV (1916) of the Johns Hopkins University.

[2] *Constitutional Law*, § 411.

[3] 96 U. S. 1.

In California v. Central Pacific R. R. Co.[5] was involved the power of Congress to construct, or to authorize individuals to construct, railroads across the States and Territories. This power the court held was implied not only in the power given to Congress to regulate commerce, but in its authority to provide for postal accommodations and military exigencies.

§ 420. Carrying of Mail Monopolized by the Federal Government.

There has never been any dispute as to the constitutional power of the Federal Government to monopolize for itself the business of carrying mail matter, for, in all countries, and since early times, this monopolization has been practiced by governments, and this fact must have been in the minds of the framers and adopters of the Constitution when they vested the Postal Power in the National Government. Thus, in United States v. Kochersperger,[6] decided in 1860, we find the court saying: "No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets."

However, as the court went on to declare in that case, the mere existence of a governmental postal system does not imply the existence of a governmental monopoly. This exists only when there is statutory provision to that effect. This statutory provision has been made in the United States, and is now found in Sections 179 to 188 of the Criminal Code of the United States.[7] There have been a number of cases dealing with the question as to what specific practices constituted a carrying of mails, but, since they have involved no questions of a constitutional character, they do not warrant consideration here.[8]

§ 421. Power of the States to Exclude from Their Borders Objectionable Mail Matter.

It will be observed that the cases *Ex parte* Jackson and *In re* Rapier [8a] go no further than to sustain the power of the United States to exclude from the mails matter which it deems objectionable. They do not decide that Congress may permit the sending into a State and the delivery therein of matter considered seditious, immoral, or otherwise objectionable by that State. This point has never been passed upon by the Supreme Court. It has, however, been debated in Congress and there is an opinion of the United States Attorney-General Cushing[9] that Congress has not this power. This opinion declares that while the Federal Government has full control, free from State interference, to regulate the transmission of the mails up to the time of their receipt by the postmaster of the office to which they are directed, the States may, in the exercise of their acknowledged police power, prevent their citizens from receiving incendiary or other matter which they deem objectionable.[10]

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[4] *Cf.* Story, *Commentaries*, § 1123, for an argument sustaining these broader powers.

[5] 127 U. S. 1.

[6] 26 Fed. Cas. 803.

[7] The constitutionality of prohibiting the establishment of private agencies for the carrying of mails was expressly affirmed in United States v. Thompson (28 Fed. Cas. No. 16, 489).

[8] See United States v. Erie R. Co. (235 U. S. 513).

[8a] See *post,* § 425.

§ 422. States May Not Maintain Postal Agencies.

From the opinion rendered in the *Ex parte* Jackson and other cases, it would appear that the States are without the power to conduct postal operations over post-roads in competition or conflict with the United States, but that they may permit, or themselves provide for, the carrying of letters or merchandise in other ways, as, for instance, by express companies, and this too, with reference to material excluded by Congress from the mails as immoral, fraudulent, or otherwise objectionable. However, the distribution of matter treasonable to the United States or inciting resistance to its laws may not, of course, be authorized, nor may interstate commerce be regulated.

§ 423. Criminal Jurisdiction of the Federal Government under the Postal Power.

Under the well-established doctrine which is applicable to all its functions, the Federal Government has power to punish the violation of regulations which it has authority to issue. As regards its postal power, it has been held that this authorizes not only the penalizing of violations of all regulations regarding the safe and efficient carrying of the mails, but also the penalizing of the use of the mails for purposes which Congress deems to be contrary to public policy and good morals.[11] Thus in Badders v. United States[12] it was held that the United States has the power to penalize the use of the mails in execution of a fraudulent scheme which the Federal Government had not the power to penalize as such. In this case will be found references to the other cases sustaining this doctrine. The court said: "Whatever the limits to the power, it [Congress] may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."

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[9] Cushing, *Opinions of Atty. Gen.*, p. 489.

[10] *Cf. Cong. Record, 53d Cong., 2d Sess., Appendix, Pt. I*, pp. 3 *et seq.*

[11] The validity of these regulations themselves for the use of the mails is discussed in another section.

[12] 240 U. S. 391.

§ 424. Exclusion from the Mails: Extent of the Power.

In an earlier chapter the constitutional power of Congress to exclude persons or commodities from interstate commerce has been considered. In general it may be said that exclusion from the mails is more easily defended, and, perhaps, is more extensive than it is in the case of interstate commerce, unless it be held, as it has not yet been expressly and explicitly held, that the very right to engage in interstate commerce is a distinctively Federal right, that is, that it is of Federal origin and creation, and, therefore, may be granted or withheld upon such conditions as Congress may see fit to impose. The author is not acquainted with a case in which it has been held, in explicit terms, that the right to send or receive matter in or through the mails owes its existence to Federal law, but it is certain that, if such a right were to be deemed one existing independently of Federal action, it would be an absolutely empty and purely abstract one were it not for the postal facilities supplied and operated by the Federal Government. From the fact that, as regards the mails, the facilities for their transmission are exclusively supplied by the Federal Government itself, which is not the case with reference to interstate commerce, it might be argued that Congress may determine in a more arbitrary manner what shall and what shall not be carried in the mails than it constitutionally can with regard to interstate commerce which it regulates rather than creates the right to engage in, and the instrumentalities for the carrying on of which it does not itself supply or operate.

However, in any case, it would seem that Congress, in exercising whatever power it may possess to exclude matter from the mails, is limited by those general limitations and prohibitions which, by the Federal Constitution, are placed upon the exercise of its enumerated powers by Congress. And thus there have arisen numerous cases in which there has been raised the question whether an exclusion from the mails, including the means provided for enforcing that exclusion, have not violated the prohibitions of the Constitution with reference to the denial of due process of law, the abridgment of freedom of speech and the press, the prohibition of unreasonable searches and seizures, etc. The more important of these cases are considered in the sections which follow.

§ 425. Exclusion from the Mails: Freedom of Press: Searches and Seizures. Ex Parte Jackson.

In *Ex parte* Jackson [13] was questioned the constitutional power of Congress to exclude lottery tickets from the mails, and in determining this the court found it necessary to consider the general extent of the administrative control that might be exercised over the postal service, and especially the relation thereof to the constitutionally guaranteed immunity of the people to be secure against unreasonable searches and seizures, as well as their right to freedom of the press. In its opinion the court pointed out that, without constitutional objection having been made, the power vested in Congress "to establish post-offices and post-roads," had, from the beginning, been construed to authorize not only the designation of the routes over which the mail should be carried, the location of the offices where the mail matter should be received and distributed, the carriage of that matter, and the establishment of regulations providing for its safe and speedy transit and prompt delivery, but the determination of what matter should be carried, its classification, its weight and form, and the charges to be made. This right to designate what shall be carried, it was declared, carries with it the right to determine what shall be excluded.

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[13] 96 U. S. 727.

However, the difficulty in this case arose not so much in establishing the power of Congress to exclude objectionable matter from the mails, as in upholding the power to provide measures for enforcing effectively the rules of exclusion which might be legislatively declared. The court said: "The difficulty attending the subject arises, not from the want of power in Congress to prescribe the regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter; between what is intended to be kept from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; [13a] and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution. Nor can any regulations be enforced against the transportation or printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulations the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

[13a] The practice and the right, in time of war, would seem to be otherwise.

In *Ex parte* Rapier [14] it was again argued that Congress was without the constitutional power to forbid the use of the mails to lottery tickets, circulars, etc., but this time upon the ground that Congress was without the power to declare the lottery itself a criminal enterprise. The exclusion was, however, sustained.

In Lewis Publishing Co. v. Morgan [15] was contested the constitutional right of Congress to provide that newspapers and periodicals should be denied the privileges of second-class matter, which include low postal rates, which did not publish sworn statements of their average circulation, the names of their editors, publishers, owners, principal stockholders, principal creditors, etc., and mark all paid reading matter as "advertisements." To the contention that these requirements constituted an infringement of the constitutionally guaranteed "freedom of the press," the court, after a careful examination of the power of Congress to classify mail under its general power to establish and operate a postal system, declared the requirements in question to be reasonable in character and therefore constitutional.

§ 426. Fraud Orders.

These orders for the regulation of the mails will be later considered in connection with discussion of Due Process of Law.[16]

§ 427. Protection of the Mails; Re Debs.

In *Re* Debs [17] was presented the question whether, for the protection of the mails, as well as of interstate commerce, the Federal Government may, by the use of judicial restraining orders or the employment of its armed forces, prevent interference, or whether it is obliged to wait until there has been such interference, and then punish the guilty ones in its courts. The court held that the former as well as the latter means are open to it.

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[14] 143 U. S. 110.

[15] 229 U. S. 288. See also United States v. Burleson (255 U. S. 407).

[16] § 754.

[17] 158 U. S. 564.

§ 428. Police Power of the States and the Postal System.

Not a few cases have arisen which have involved the extent to which the States, in the exercise of their legitimate police powers, may interfere with or control the operations of the Federal postal system. In a very early case it was held that a municipal corporation might punish a mail carrier for driving recklessly through crowded streets.[18]

The police provisions of the States, to be valid, must be reasonable in character, and, of course, not directed in any discriminating way against the operations of the postal system. Thus, in Illinois Central R. Co. v. Illinois,[19] the Supreme Court held invalid, as an unconstitutional interference with both interstate commerce and the carrying of the mails, a State law which required interstate trains to deviate from their direct routes in order to pass through certain places.

It would appear that the States may not directly interfere with the carrying of the mails even for the purpose of obtaining execution of writs which have been legally issued. Thus, while it was held in a United States Circuit Court that such a writ might be served upon a carrier of the mails since this did not detain him,[20] it was held in another case that horses employed in carrying the mails could not be stopped and seized in execution of a lien.[21]

However, in United States v. Kirby,[22] the Supreme Court held that a carrier of the mails might be arrested and detained upon a State indictment for murder. After asserting that the Federal statute forbidding interference with the mails had no application to acts under State authority which were lawful in themselves and which caused only a temporary impediment to the mails, the court said: "No officer or employee of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts when the crimes charged against them are not merely *mala prohibita,* but are *mala in se.* But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language."

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[18] United States v. Hart (1 Peters C. C. 390) (1817). In 1852 the Attorney-General of the United States advised that it was constitutional for a city to prohibit railroads from running at a faster rate than six miles an hour within the city's limits, even though the mails might be thereby delayed. He said: "When such regulations are fairly and discreetly made with intent to preserve the peace, safety and well-being of the inhabitants of the city, they may be said to flow from powers necessary and proper in themselves, which the act of Congress does not intend to take away or impugn." (5 Op. Atty. Gen. 554.) *Cf.* Rogers, *The Postal Power of Congress*, p. 131.

[19] 163 U. S. 142. See also Mississippi R. Com. v. Illinois Central R. Co. (203 U. S. 335); and Johnson v. Maryland (254 U. S. 51).

[20] United States v. Harvey (8 Law Rep. 77).

[21] United States v. Barney (3 Hughes Rep. 544).

[22] 7 Wall. 482.

In United States v. Sears [23] it was held that a mail wagon might not be stopped in order to compel it to pay tolls, the court saying: "It is not the right of the company to the tolls under the State law which is doubted, but the right to stop the passage of the mails to enforce their collection which is denied."

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[23] 55 Fed. Rep. 268.

CHAPTER LIV

PATENTS AND COPYRIGHTS

§ 429. Patents.

Congress is given the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The granting by the United States of a patent right does not give to the patentee the authority to exercise it in a State in violation of the police laws of that State.[1]

It seems to be established that a patentee, in order to retain the rights granted him, is not compelled to make use of these rights.[2]

Generally speaking, controversies growing out of or relating to patents, except as regards infringements or the nature and scope of patent rights, are not suits maintainable in Federal courts under patent laws. They fall under the general common or statute law of the States.[3]

The question as to the right of patentees to restrict the resale price or the use of patented articles has been discussed in connection with the prohibitions of the anti-trust acts.[4]

In Long v. Rockwood [5] it was held that the States may not tax royalties for the use of patents issued by the United States, since, to do so, it was declared, would be to interfere with the exercise of a Federal right or instrumentality.

§ 430. Trade-Marks.

The first attempt upon the part of the Federal Government to provide for the registration of trade-marks was in 1870 when Congress enacted a law[6] entitled "An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights," which provided that persons who had established by usage an exclusive right to a device in the nature of a trade-mark might register it in the Patent Office, and that other persons using devices thus registered, without the consent of their owners, could be subject to civil suit for damages. By act of 1876[7] it was provided that the fraudulent use, sale or counterfeiting of such registered trade-marks could be punished by fine or imprisonment.

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[1] Patterson v. Kentucky (97 U. S. 501). See also Webber v. Virginia (103 U. S. 334).

[2] United States v. Am. Bell Telephone Co. (167 U. S. 224); E. Bement and Sons v. National Harrow Co. (186 U. S. 70).

[3] Wilson v. Sandford (10 How. 92); Hartell v. Tilghman (99 U. S. 547); Briggs v. United Shoe Machinery Co. (239 U. S. 48); Luckett v. Delpark (270 U. S. 496).

[4] See § 346.

[5] 277 U. S. 142.

[6] 16 Stat. at L. 198.

In United States v. Steffens[8] it was held that these laws could not be upheld as the exercise of a power granted to the United States by Article I, Section 8, Clause 8 of the Constitution "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries," nor could they be validated as a regulation of interstate and foreign commerce or commerce with the Indian tribes unless their application were limited to such commerce. Not being thus limited, the acts were held void.

The act of 1870 having been held invalid, Congress, in 1881, passed a new law, since superseded by the law of 1905,[9] which, as subsequently amended, is now in force, and which is expressly confined in its operation to foreign and interstate commerce and commerce with Indian tribes. The act does not pretend to create a property right in, or to, trade-marks, but provides that those persons who do register them may sue in the Federal courts for damages in case of the unauthorized use by others of their registered trade-marks, or to prevent the importation of goods bearing an infringing trade-mark.[10]

§ 431. Copyrights.

A copyright, as distinguished from a trade-mark, is wholly a creation of Federal statute; and such rights as it carries are wholly dependent upon such legislation. This has not been questioned since the decision of the court in Wheaton v. Peters.[11] The only questions, then, which have arisen relating to copyrights have been those of statutory construction, and as to what materials are susceptible of being copyrighted. In Kalem v. Harper Bros.[12] it was held that the provision of the law giving to authors the exclusive right to dramatize any of their works was valid as to pantomime exhibitions by means of moving-picture films.

In Higgins v. Keuffel[13] it was held that a mere label might not be copyrighted. "To be entitled to a copyright," the court declared, "the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

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[7] 19 Stat. at L. 141.

[8] 100 U. S. 82. See also United Drug Co. v. Rectanus Co. (248 U. S. 90).

[9] 21 Stat. at L. 502; 33 Stat. at L. 724; 36 Stat. at L. 918; 37 Stat. at L. 649.

[10] For an excellent statement of the present Federal law as now operative, see the article "Trade-Marks and the United States Patent Office," by Karl Fenning, Assistant Commissioner of Patents, in XI *American Bar Association Journal*, 461.

[11] 8 Pet. 591.

[12] 222 U. S. 55.

[13] 140 U. S. 428.

Little v. Gould[14] is the authority for the doctrine that, in the absence of congressional regulation, a State may afford protection to literary productions.

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[14] 2 Blatchf. 165.

CHAPTER LV

EXPRESS CONSTITUTIONAL LIMITATIONS UPON THE FEDERAL GOVERNMENT WITH REFERENCE TO THE DEFINITION AND PUNISHMENT OF CRIMES

§ 432. Express and Implied Limitations.

The essential nature of the American Federal system as provided for by the Constitution carries with it the general limitation upon the Federal Government that it can rightfully exercise only those powers which have been expressly granted to it, or which are implied as "necessary and proper" for carrying into execution those which have been thus expressly granted. In addition, however, to this general limitation, the Constitution and the Amendments thereto contain a considerable number of express limitations upon Federal authority either by way of prohibiting the doing of specific things, or by way of limiting the way in which certain of the specifically granted powers may be exercised. There also exist, as has been earlier referred to, implied limitations upon Federal authority deducible from the specific limitations or from the general nature of the American Union in much the same way that the implied powers of the Union are deducible.

Certain of these limitations, express or implied, thus imposed, operate as an absolute denial to Congress of a legislative power with reference to the subjects specified, without regard to time or place. Others of these limitations, as was held in the Insular Cases, serve to restrain the legislative powers of Congress only when dealing with the States and incorporated territories.

Many of the limitations expressly laid upon the Federal Government by the Constitution have been or will be discussed in connection with the express powers to which they relate. Those relating to certain subjects, such as due process of law, the equal protection of the laws, freedom of speech and press, etc., will, because of their importance, be discussed in separate chapters. The present chapter will deal with the constitutional limitations under which the Federal Government operates with reference to the definition and punishment of crimes.

Generally speaking, the Federal Government, because one of limited powers, has no constitutional right to define or provide for the punishment of crimes except in so far as this may be a proper and necessary means of carrying into effect the powers which are vested in itself, including, of course, its authority to protect itself and to protect individuals against the violation of their Federal rights against action by other individuals or by the States of the Union. However, by way of exception, or perhaps for reasons of especial caution, the Constitution grants to Congress the authority to define and provide for the punishment of felonies and piracies on the high seas, and to punish treason against itself; but what shall be deemed to constitute this treason the Constitution itself defines. Furthermore, as will presently be discussed, it is declared that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. Congress is also expressly authorized to punish counterfeiting the securities and current coin of the United States.

§ 433. Piracies and Felonies on the High Seas: Definition and Punishment of.

By Article I, Section 8, Clause 10 of the Constitution Congress is given the power "To define and punish piracies and felonies committed on the high seas." Had this power not been expressly given it would probably have been deduced as an implied power from the admiralty and maritime jurisdiction of the United States, or from its general jurisdiction in matters of international concern, or, in part at least, from its right to regulate foreign commerce.

As regards both piracies and felonies on the high seas it is to be observed that the authority is granted not only to punish but to define, and, in pursuance of this authority, Congress has denominated as piracies a considerable number of acts,[1] and, among them, some, as, for example, the slave trade,[2] which are not so denominated by the general principles of international law.[3] The act declaring slave trade to be piracy was declared constitutional in United States v. Bates [4] and its validity has not been since questioned.

The term "high seas" has been construed to cover any waters on the sea coast beyond the low-water mark, even though within a roadstead or bay which is within the territorial jurisdiction of another State. In this respect, as is pointed out in United States v. The Pirates,[5] the delimitation of foreign jurisdictional limits in the case of piracies is not the same as that which determines belligerency or neutrality in time of war.

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[1] See Chapter 12 of the Federal Criminal Code.

[2] See Chapter 10 of the Federal Criminal Code.

[3] "Piracy under the law of nations is a robbery or forcible depredation on the high seas without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility." *Cyclopedia of Law and Procedure*, vol. 30, p. 1627.

[4] 24 Fed. Cas. No. 14,544.

[5] 5 Wh. 184.

§ 434. Offences against the Law of Nations.

In the same clause of the Constitution in which the Congress is authorized to define and punish piracies and felonies committed on the high seas, authority is given to define and punish "offenses against the law of nations." The use of the term "law of nations" is of significance since it gives constitutional recognition to the existence of such a body of laws, and implies an obligation upon the part of the United States to punish criminal violations of its provisions. It would seem, although there are no clear decisions of the Supreme Court upon this point, that, although Congress is given a general authority to define as well as to punish, it may not rely upon this grant for authority to include within the Federal criminal jurisdiction offences which cannot be fairly said to be within the purview of what is commonly known as international law or the law of nations.

The authority given to Congress to define and punish all offences against the law of nations would seem to be broad enough to authorize the prohibition and punishment of acts which, though committed within the territorial limits of the several States, may give rise to international responsibilities upon the part of the United States. It would also seem that this authority may be implied from the general fact that to the Federal Government is given the exclusive control of foreign relations, and that to it alone foreign States look for the redress of any injuries which they may conceive themselves to have suffered. Where the responsibility is imposed, the right to prevent its accruing may properly be implied.

A most interesting case upon this point is that of United States v. Arjona[6] in which was questioned the constitutionality of the law of Congress defining as a crime the counterfeiting within the United States of the notes, bonds, and other securities of foreign governments. The authority for this act could not be found in Article I, Section 8, Clause 6, for that relates only to the securities and current coin of the United States. Therefore, in sustaining its validity, the court was obliged to have recourse to the authority to punish offences against the law of nations and to the general control which the Federal Government has over all matters that pertain to or may involve international rights and responsibilities.

§ 435. Treason.

The power of Congress with reference to both the definition and punishment of treason is limited by Section 3 of Article III of the Constitution. The clauses of this section provide as follows:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

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[6] 120 U. S. 479.

"No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"The Congress shall have power to declare the punishment of treason: but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." [7]

The purpose of these provisions is to exclude the possibility of the Federal Government, through either its judicial or legislative branches, following the precedents of English law and practice, and declaring a great variety of acts to constitute treason and punishable as such.

Following in the main the words of the Constitution, Congress has by statute declared that "whoever, owing allegiance to the United States levies war against them, or adheres to their enemies giving them aid and comfort within the United States or elsewhere, is guilty of treason." [8]

§ 436. Treason May Be Committed by Aliens.

Treason is a breach of allegiance, and it will be observed that the statute restricts the definition of the offence to persons owing allegiance to the United States.

This allegiance may be one of full citizenship, or one based upon the presence of an alien, and the commission of the treasonable act within the territorial limits of the United States. In an earlier chapter it has been pointed out that an alien within the territorial limits of a State, whether domiciled there or not, owes for the time being a qualified allegiance to that State. He enjoys the protection of its laws, and may be guilty of treason if he wages war against or gives comfort or aid to the enemies of that sovereignty.[9]

In the Carlisle case the alien was domiciled in the United States but it would not appear that domiciliation is necessary as a basis for holding the alien liable for treason, if the act of treason be committed within the territorial jurisdiction of the United States. If the act be committed by the alien outside of such jurisdiction, no treason can be alleged.[10]

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[7] Art. III, Sec. 3.

[8] 35 Stat. at L., chap. 321, p. 1088, § 1 (Criminal Code). The phraseology of section 5331 of the Rev. Stat. is here slightly changed. By Section 2, the punishment for treason is fixed at death, or, at the discretion of the court, imprisonment at hard labor for not less than four years, and a fine of not less than ten thousand dollars, and disqualification from holding office under the United States.

[9] Carlisle v. United States (16 Wall. 147); Radich v. Hutchins (95 U. S. 210).

[10] United States v. Villato (2 Dall. 370).

§ 437. No Distinction in United States between High and Petit Treason.

The distinction between "high" and "petit" treason is not known to American constitutional law.[11] Or, rather, under our law, petit treason no longer exists.

§ 438. Misprision of Treason.

Misprision of treason is defined and its punishment provided for by Section 5333 of the Revised Statutes.[12]

The constitutionality of this provision was considered and not questioned in United States v. Wiltberger.[13]

§ 439. What Constitutes Treason.

By the definition of the Constitution treason to the United States may be charged only in cases where the accused has levied war against the United States, adhered to its enemies, or given them aid and comfort; and, for conviction, there must have been an overt act.

The distinction between a mere riot, or resistance to the execution of a law, and treason is not always easy to draw, but in general the authorities hold that the resistance to public authority, in order to constitute a levying of war and, therefore, treason, must amount to an effort directly to overthrow the government, or to prevent a law from being executed not simply in a particular instance, but generally.

Thus in United States v. Mitchell [14] it was held by a Federal court that an insurrection of armed men, the object of which was to suppress the excise offices and to prevent by force and intimidation the execution of an act of Congress, was a levying of war, and, as such, treason. Upon the other hand, it was held in United States v. Hoxie [15] that, if the resistance offered to the execution of the law had no public purpose in view, treason was not committed, however great the degree of force employed.

§ 440. Enlistment of Men Does Not Amount to Levying War.

The most careful consideration of the definition of treason by the Supreme Court is that given in *Ex parte* Bollman.[16] Chief Justice Marshall said in his opinion in that case: "To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

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[11] Statute 25 Edw. III defines petit treason as the killing of a husband by a wife, of a master by his servant, or of a prelate by an ecclesiastic owing obedience to him.

[12] "Whoever owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals, and does not, as soon as may be, disclose and make known the same to the President, or to some judge of the United States, or to the governor, or to some judge or justice of a particular State, is guilty of misprision, and shall be imprisoned not more than seven years, and fined not more than one thousand dollars." Sec. 2, Chap. 321, 35 Stat. at L. 1088, act March 2, 1909.

[13] 5 Wh. 76.

[14] 2 Dall. 348. See also the case of Vigal, 2 Dall. 346, and that of William Fries, 3 Dall. 515.

[15] 1 Paine (U. S.), 265.

[16] 4 Cr. 75, 126.

In this connection it may be observed that by the Espionage Act of June 15, 1917,[17] Congress has rendered severely punishable acts which are essentially treasonable in character, but which are not denominated as "Treason," and the proof of which is not obliged to satisfy the constitutional requirements in trials for treason.

§ 441. Adhering to Enemies, Giving Them Aid and Comfort.

As to what constitutes adhering to enemies of the United States, giving them aid and comfort, the courts have found as much difficulty in determining as they have had in determining what constitutes a levying of war. In general, however, as summed up by "Cyc," they have construed these constitutional words "to clearly include such acts as furnishing the enemy with arms, troops, supplies, information, or means of transportation,[18] and to include in a general way any act indicating disloyalty and sympathy with the enemy, and which is directly in furtherance of their hostile designs, regardless of whether the motive prompting the act is merely sympathy or pecuniary gain.[19] It seems, however, that it is not essential that the effort to aid be successful, provided overt acts are done which, if successful, would have advanced the interests of the enemy." [20]

It scarcely needs be pointed out that the offences of adhering to the enemies of the United States or the giving to them of aid and comfort which constitutes treason may be committed in cases in which there is no levying of war against the United States. Thus, to give instances cited by Mr. Warren in the article to which reference has been made, treason is committed by enlistment in the United States to serve in the force of a foreign enemy; the selling of goods to or buying of goods from the enemy government or to or from its agents or forces,[21] by communicating intelligence of military value to the enemy,[22] delivering up prisoners and deserters to the enemy;[23] all acts which in any way tend or are intended to obstruct or weaken the military operations of the United States; the advising or indicting of others to give aid or comfort to the enemy.[24]

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[17] 40 Stat. at L. 217.

[18] Vol. 58 Cyclopedia of Law and Procedure, 956. Citing Hanauer v. Doane (12 Wall. 342); *In re* Charge to Grand Jury (30 Fed. Cas. No. 18,270); *In re* Charge to Grand Jury (30 Fed. Cas. No. 18,272); United States v. Greathouse (26 Fed. Cas. No. 15,254).

[19] Citing *In re* Charge to Grand Jury (30 Fed. Cas. No. 18,272); United States v. Hodges (26 Fed. Cas. No. 15,374).

[20] Citing United States v. Greathouse (26 Fed. Cas. No. 15,254.)

For a general discussion of both English and American cases dealing with adhering and giving aid and comfort to the enemy, see the excellent articles of Mr. Hayes McKinney entitled "Treason under the Constitution of the United States" in 12 *Illinois Law Review*, 381 (January, 1918); and that by Mr. Charles Warren, entitled "What is Giving Aid and Comfort to the Enemy?" in the *Yale Law Journal*, January, 1918.

§ 442. Treason and the Civil War.

The fact that, during the American Civil War, the Confederates were recognized by the United States as belligerents and the war as a public one, did not carry with it a "recognition" of the Confederate Government such as would carry with it an estoppel upon the part of the United States to treat as traitors those who gave aid and comfort to the Confederate Government or served in its military forces. Upon the contrary, the United States continued to assert its right to treat as traitors those who gave support to the Southern Cause.

That the United States deemed that those who had served in the Confederate forces or who had given their allegiance and support to the Confederate Government might be punished as traitors was shown in the numerous indictments for treason brought against such. During the war it was not considered politic to press these indictments to their ultimate issue because of fear of reprisals on the part of the Confederate authorities, but, at the conclusion of war, hundreds, indeed thousands, of such indictments were returned. However, these were not pushed to trial, although there were many persons who urged that at least the leaders of the Rebellion should be punished as traitors.[25]

In Thorington v. Smith [26] the court declared that the Confederate Government had not obtained a status which would relieve its supporters from a charge of treason.

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[21] Sprott v. United States (20 Wall. 459); Hanauer v. Doane (12 Wall. 342); Young v. United States (97 U. S. 39); People v. Lynch (11 Johns. 549).

[22] Charge to Grand Jury (30 Fed. Cas. No. 18,272).

[23] United States v. Hodges (26 Fed. Cas. No. 15,374).

[24] 30 Fed. Cas. No. 18,272.

[25] As is well known Jefferson Davis was indicted for treason under the Treason Act of 1790 which prescribed the penalty of death upon conviction. However, before final trial, Mr. Davis was freed under the unconditional pardon, of December 25, 1868, by the President of all who had participated in the war.

[26] 8 Wall. 1.

§ 443. Offences, Other than Treason, Against the Existence and Operations of the Federal Government.

The Federal Government, though restrained by the Constitution with reference to the definition of treason, has the general power to define and punish as it sees fit all acts against its existence or undisturbed operation. Thus it has by statute defined and provided punishment for misprision of treason, inciting or engaging in rebellion or insurrections, criminal correspondence with foreign governments, seditious conspiracy, recruiting soldiers or sailors to serve against the United States, enlistment to serve against the United States, and, generally, acts which interfere with the effective operations of the government.[27]

Whether, and to what extent, Congress has the power to punish seditious libels will be considered in the section dealing with Freedom of Speech and Press.[28]

By the Espionage Act of June 15, 1917,[29] a long list of acts calculated to interfere with the successful carrying on of war by the United States, are declared criminal and punishable as such. Some of the provisions of this important act will receive consideration in connection with the discussion of such subjects as freedom of speech and press, the war powers of the Federal Government. The acts of Congress growing out of the Civil War have been already referred to.

§ 444. Corruption of Blood or Forfeiture.

The Constitution provides that no attainder of treason "shall work corruption of blood or forfeiture except during the life of the person attainted."

In order to avoid a possible claim against the constitutionality of the act of 1862, earlier referred to, Congress later passed a Joint Resolution which declared that the punishments or proceedings under the act should not be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.[30]

§ 445. Treason Against a State of the Union.

The punishment of the crime of treason against the United States is placed exclusively within the control of the Federal authorities. Treason against an individual State of the Union, however, is punishable by the authorities of the State, which authorities have, subject to the general limitations placed upon them by the Federal Constitution with reference to due process of law, *ex post facto* legislation, etc., the power to determine what acts shall be held to constitute treason against the State.[31]

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[27] See §§ 1–8 and 27–84, of act of March 4, 1909, codifying, revising, and amending the penal laws of the United States (35 Stat. at L. 1088).

[28] As to the constitutional power of Congress to afford special protection to the President, and to punish acts of violence committed against him, see House Rpt. 1422, 57th Cong., 1st Sess.

[29] 40 Stat. at L. 217.

[30] 12 Stat. at L. 627. For construction of this Resolution see Bigelow v. Forrest (9 Wall. 339); Day v. Micou (18 Wall. 156); Wallach v. Van Riswick (92 U. S. 202). *Cf.* Watson, *On the Constitution*, p. 1157.

§ 446. Bills of Attainder.

Clause 3 of Section 9 of Article I provides that "No bill of attainder . . . shall be passed." And Clause 1 of Section 10 of the same article imposes a like prohibition upon the States.

These clauses have given rise to an inconsiderable number of judicial determinations. The principal case in definition of a bill of attainder is that of Cummings v. Missouri [32] in which the court held unconstitutional the test oath of loyalty imposed by the Constitution of Missouri as a condition precedent to holding any State office of trust or profit, or practicing the profession of the law or ministry. The court declared: "The disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment."

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

In *Ex parte* Garland,[33] decided at the same time as the Cummings case, the court held void, as a bill of attainder, the act of Congress of January 24, 1865, prescribing an oath that the deponent had never voluntarily borne arms against the United States, given aid to its enemies, etc., as a qualification for admission as an attorney, before the Federal courts.[34]

A statute making the non-payment of taxes evidence of disloyalty during the Civil War and providing for the forfeiture of lands without a judicial hearing has been held to be a bill of attainder,[35] as was a law excluding from the United States Chinese who are citizens of the United States.[36]

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[31] Upon this subject, see Watson, *On the Constitution*, pp. 1224 and 1778.

[32] 4 Wall. 277.

[33] 4 Wall. 333.

[34] Justices Miller, Swayne and Davis dissented in both the Garland and Cummings cases.

[35] Martin v. Snowden (18 Gratt. 100).

In Pierce v. Carskadon[37] it was held that a State act which deprived defendants of an existing procedural right with reference to the trial of past offences came within the constitutional prohibition as to bills of attainder, and was governed by the Garland and Cummings cases. The act in question was one which, as a condition of a rehearing in a case of trespass and carrying away of goods, required that the defendants should swear that they had never voluntarily borne arms against the United States, the reorganized Government of Virginia, or the State of West Virginia; that they had never given aid or comfort to persons engaged in armed hostility against these governments; that they had never sought accepted or attempted to exercise any office or appointment whatever, civil or military under these governments; and that they had never yielded any voluntary support to any government or pretended government hostile or inimical to those governments.

§ 447. Ex Post Facto Legislation.

Ex post facto legislation upon the part of the States as well as by Congress is specifically forbidden by the Constitution.[38] It thus results that, for the determination of what constitutes *ex post facto* legislation, within the meaning of the Constitution, the decisions of the Supreme Court with reference to State laws alleged to be of this character are of equal weight to its decisions with regard to acts of Congress against which the same defect is charged.

In the early case of Calder v. Bull[39] the prohibition was declared to relate only to criminal and not to civil proceedings, and, as thus limited, *ex post facto* laws were declared to be "every law that makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."[39a]

By later decisions this definition of *ex post facto* legislation has been broadened so as to include all laws which in any way operate to the detriment of one accused of a crime committed prior to the enactment of such laws.

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[36] *In re* Yung Sing Hee (13 Saw. 482).

[37] 16 Wall. 234.

[38] Art. I, Sec. 9, Clause 3; and Art. I, Sec. 10, clause 1.

[39] 3 Dall. 386, 390.

[39a] *Cf.* Beazell v. Ohio (269 U. S. 167, 170).

In Thompson v. Missouri[40] the court held that a State statute authorizing the comparison of disputed handwriting with any writing proved to be genuine was not an *ex post facto* law in its application to crimes previously committed, as altering the legal rules of evidence in existence at the time of the commission of the offence.

In Johannessen v. United States[41] it was held that the retroactive operation of a Federal statute with regard to impeachment of naturalization certificates fraudulently or illegally obtained did not render the measure invalid as being *ex post facto* in character. The court said: "The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. . . . The act makes nothing fraudulent or unlawful that was honest and lawful when it was done."

In Bugajewitz v. Adams[42] it was held that it was not a violation of the *ex post facto* prohibition for Congress to provide for the deportation of aliens found practicing prostitution after their entry into the United States, even though this provision did not exist at the time of their entry. The court said that the determination of facts upon which to base deportation is not a conviction of crime, nor is the deportation a punishment. That prostitution was a crime by the local or State law was but a coincidence of the local law with the policy of Congress.[43]

In McDonald v. Massachusetts,[44] it was contended that a statute which defined as an habitual criminal one who had been twice convicted of a crime, and, for subsequent offences, provided a more severe penalty than would otherwise be imposable, was *ex post facto* in its operation when the earlier offences were committed prior to the passage of the act. The court, however, held that the additional penalties applied to the subsequent acts committed after the passage of the act. "The punishment is for the new crime only, but is the heavier if he is an habitual criminal."

In Hopt v. Utah[45] it was held that statutes which enlarge the class of persons who may testify in criminal proceedings do not operate in an *ex post facto* manner when availed of in prosecutions for crimes committed prior to the passage of such acts. The court said: "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed."

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[40] 171 U. S. 380.

[41] 225 U. S. 227.

[42] 228 U. S. 585.

[43] For the doctrine that deportation is not to be construed as a punishment, see also Mahler v. Eby (264 U. S. 32).

[44] 180 U. S. 311.

[45] 110 U. S. 574, 589.

It is well established that the constitutional provision regarding *ex post facto* legislation does not prevent retroactive changes as to the modes in which penalties are carried out, or even changes in the penalties themselves, so long as the accused or convicted one is not, in any substantive way, prejudiced thereby. This rule, it is evident, leaves it for final determination in each individual case by the court of last resort whether or not this is the case. The cases cited in the footnote are illustrations of the holding of the Supreme Court as to this questions of fact.[46]

The *ex post facto* provision of the Constitution relates to acts of legislation and not to their construction by the courts. This has been the doctrine of the Supreme Court from the first. The authorities upon this point were reviewed in Ross v. Oregon.[47]

§ 448. Jury Trial.

By Article III, Section 2, Clause 3, it is provided that "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

By the Sixth Amendment, this requirement of a jury is repeated and the additional conditions imposed that the trial of persons accused of crime shall be speedy and public, the jury an impartial one, selected from the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defence.

The relation between this Amendment, and the third clause of Section 2 of Article III is, as stated in Callan v. Wilson,[48] that in the latter are enumerated, *ex abundanti cautela*, the rights to which, according to settled rules of common law, the accused is entitled.[49]

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[46] *Ex parte* Medley (134 U. S. 160); Holden v. Minnesota (137 U. S. 483); Rooney v. North Dakota (196 U. S. 319); Malloy v. South Carolina (237 U. S. 180); Hawker v. New York (170 U. S. 189).

[47] 227 U. S. 150.

[48] 127 U. S. 540.

[49] *Cf.* Story, *Commentaries*, § 1791.

Offences committed outside the jurisdiction of a State are not local, but may be tried at such places as may be designated by Congress.

In the first crimes act of April 30, 1790, it was provided that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." In other words, the provisions of the Sixth Amendment were held by Congress to apply only to crimes committed within a State and within its jurisdiction, leaving applicable to crimes committed outside a State only the provisions of Section 2 of Article III of the Constitution.[50]

§ 449. Jury Trial in the District of Columbia and the Territories.

In Callan v. Wilson [51] it was held that the right of jury trial necessarily applied within the District of Columbia and the Territories.[52] As to this the court said that this right "was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases."

§ 450. Unanimity.

In Springville v. Thomas [53] it was claimed that the territorial legislature of Utah was empowered by the Organic Act [of Congress] September 9, 1850, to provide that unanimity of action on the part of the jurors in civil cases was not necessary to a valid verdict. The Supreme Court, however, said: "In our opinion the Seventh Amendment [54] secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so." The reasoning thus applied to the Seventh Amendment would of course equally apply to the Sixth Amendment. It is clear, however, that this *dictum* has been overruled by the Insular Cases so far, at least, as regards the power of Congress over unincorporated territories.

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[50] United States v. Dawson (15 How. 467); Jones v. United States (137 U. S. 202).

[51] 127 U. S. 540. See also Capital Traction Co. v. Hof (174 U. S. 1).

[52] By the later Insular Cases four of the justices held that this is true only as to "incorporated" territories, while Justice Brown held that it applies only when Congress has expressly or impliedly extended the Constitution to the territory in question.

[53] 166 U. S. 707.

[54] "In suits at common law, where its value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

§ 451. Twelve Jurors Required.

This declaration in Springville v. Thomas is quoted with approval in Thompson v. Utah,[55] the court adding: "It is equally beyond question that the provisions of the National Constitution relating to criminal prosecutions apply to the Territories of the United States." Assuming this to be true the court, in this latter case, went on to inquire whether the jury referred to in the Constitution is necessarily a jury of twelve persons, neither more nor less. This inquiry was resolved in the affirmative.

§ 452. Courts and Actions in which Jury Not Required.

The right of trial by jury provided for in the Constitution applies only in the Federal courts, and in them it applies only to those cases in which, by common practice at the time the Constitution was adopted, it was employed in the colonies and in England. Thus it does not apply to equity causes, to cases in admiralty and to military courts, nor where the special prerogative rights of courts are involved, as, for example, in proceedings for disbarment or for contempt.

A serious constitutional question might, however, be raised by a legislative attempt to extend equity jurisdiction over a matter not essentially equitable in nature, and thus render it triable without a jury. As to such action upon the part of the States, the Federal question involved would possibly be one of due process of law.[56]

In habeas corpus proceedings a jury is neither required nor proper.

It has been held that due process of law does not require a jury in the execution of administrative and executive functions, as, for example, the enforcement of the Chinese Exclusion Acts.[57]

§ 453. Petty Offences.

It has been generally recognized by courts, Federal as well as State, that the guarantee of the right to a trial by jury does not apply to the petty offences which, at the time the Constitution was adopted, it was generally recognized might be more summarily dealt with. The enjoyment of the right is not, however, limited to felonies.[58]

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[55] 170 U. S. 343.

[56] Mugler v. Kansas (123 U. S. 623).

[57] See Chapter LXXVII.

[58] For an excellent account of petty offences as known in Great Britain and in the American colonies prior to the adoption of the Constitution, see the article by Felix Frankfurter and T. G. Corcoran entitled "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury," in XXXIX *Harvard Law Review*, 917.

In Callan v. Wilson,[59] which was an appeal from a judgment refusing, upon writ of habeas corpus, to discharge the appellant from the custody of the marshal of the District of Columbia, the appellant having been sentenced to jail for thirty days upon conviction without jury trial in the police court of the District upon a charge of conspiracy, the Supreme Court, after reviewing cases in the States, and lower Federal courts, declared: "Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put to trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury in an appellate court, after he has been once fully tried, otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

§ 454. Infamous Crimes.

The provision of the Fifth Amendment that no one shall be held to trial for a criminal offence unless on a presentment or indictment of a grand jury, is expressly limited to capital or other infamous crimes.[60] It would seem that there is no hard and fast definition, in American law at least, of an "infamous crime," each case having thus to be decided on its merits.[61]

The practical construction which the cases have put upon the constitutional provision with reference to indictments has been that there must be an indictment in every case in which the imprisonment may be for more than one year, inasmuch as by Section 5541 of the Revised Statutes it is provided that whenever a person is sentenced to more than one year's imprisonment he may be required to serve the sentence in a penitentiary. By the provision of Section 335 of the act of March 4, 1909, revising, amending and codifying the penal laws of the United States, it is declared that "all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

It is thus apparent that, in the Federal courts, the distinction between crimes which are infamous and those which are not, is substantially that between felonies and misdemeanors. It is, however, suggested by the court in *Ex parte* Wilson that there may be crimes which, in public opinion, are so disgraceful that they may be held infamous without regard to the character of punishment attached to their commission. It would also appear that where hard labor is added to imprisonment the crime may be deemed to be infamous within the meaning of the Fifth Amendment.

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[59] 127 U. S. 540.

[60] "Cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger" are excepted from the grand jury requirement.

[61] For a general discussion of the subject, see *Ex parte* Wilson (114 U. S. 417).

It is also to be observed that the decisive fact is not as to what punishment may, in fact, be inflicted, but as to what penalty may, under the law, be inflicted.[62]

§ 455. Waiver of Constitutional Guaranties.

The law governing the waiver by the accused of his constitutional right to a trial by jury in criminal actions, or to a trial by less than twelve jurors, and, indeed, the waiver of any constitutional guaranty, was not until recently in a clearly determined condition. In cases arising under State constitutions, inharmonious doctrines had been declared. In some jurisdictions the position had been taken that the guaranties are intended merely for the benefit of the accused and may, therefore, be waived. In other States the courts had held that the guaranty of jury trial in criminal cases is one in which the State also has an interest, and which for that reason may not be waived. In some courts, a third view had been taken that the jury is essential to give the court jurisdiction, and that while, in case of a plea of guilty, the court may at once pronounce judgment, because there are no facts to be determined, where the plea is not guilty, an issue is raised which only a jury is competent to decide.[63]

In the United States Supreme Court it was held in Schick v. United States[64] that jury trial might be waived in the trial of minor offences. The constitutional provision, it was said, must be interpreted in the light of the common-law practice as it existed at the time of the adoption of the Constitution, and this practice, as shown by Blackstone's *Commentaries*, which the court quoted, was that while the word "crimes" technically included misdemeanors as well as felonies, in common usage, a crime denoted "such offenses as one of a deeper and more atrocious dye," and that it is in this sense that the word is used in the constitutional requirement that the trial of all crimes shall be by jury. Public policy, it was declared, does not demand that the lesser offences, termed misdemeanors, shall be tried by jury, and "where there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy." [65]

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[62] *Cf.* United States v. Moreland (258 U. S. 433), in which it was held that an offence the punishment for which may be imprisonment at hard labor in a workhouse of the District of Columbia, is an infamous crime.

[63] See note in *Columbia Law Review*, VIII (1908), 577, and authorities there quoted.

[64] 195 U. S. 65.

In Dickinson v. United States,[66] however, the Circuit Court of Appeals for the First Circuit held that a cashier indicted for the unlawful conversion of certain moneys, funds, credit and credits described as a misdemeanor by Section 5209 of the Revised Statutes, could not consent to a trial by a jury of less than twelve. In this case the court distinguished between the provisions of the first ten amendments which were declared to be in the nature of a Bill of Rights for the benefit of the individual, and the requirements of the Constitution as originally adopted, which establish a form of government which may not be altered by the individual.

In Lewis v. United States [67] that court held that, in felonies, the presence of the accused could not be waived either by himself or by counsel. The record must show, affirmatively, the presence of the prisoner in court during the trial.[68] It would seem that, in this case at least, the Supreme Court held that a right guaranteed by the amendments as distinguished from those in the body of the Constitution, might not be waived. However, in the recent case of Patton v. United States,[68a] the Supreme Court, in an elaborate opinion, has held that one on trial for a crime, even of a serious nature, may waive his constitutional right to be tried by a jury.

§ 456. Right to Jury Trial Not Fundamental.

In the majority opinion in Hawaii v. Mankichi [69] the rather surprising statement was made that grand and petit juries in criminal proceedings "are not fundamental in their nature, but concern merely a method of procedure" and that, therefore, these two institutions were not to be construed as necessarily introduced into the islands by the resolution of Congress of July 7, 1898, recognizing the islands "as a part of the territory of the United States and subject to the sovereign dominion thereof," and continuing in force the municipal legislation of such islands not inconsistent with such resolution, "nor contrary to the Constitution of the United States."

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[65] Justice Harlan dissented in an elaborate opinion, citing, *inter alia*, Hopt v. Utah (110 U. S. 574); Thompson v. Utah (170 U. S. 343); Cancemi v. People (18 N. Y. 128); Hill v. People (16 Mich. 351); State v. Carman (63 Iowa, 130); State v. Mansfield (41 Mo. 470); Wilson v. State (16 Ark. 601); Work v. Ohio (2 Ohio St. 296); United States v. Taylor (3 McCrary, 500).

[66] 159 Fed. Rep. 801.

[67] 146 U. S. 370.

[68] As to the waiver by the accused of his right to plead *autrefois acquit*, by taking an appeal to a superior court, see section entitled "Double Jeopardy."

[68a] 281 U. S. 276.

[69] 190 U. S. 197.

§ 457. Jury Trial in Civil Suits.

By the Seventh Amendment it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This provision, it has been determined by the Insular Cases, does not apply *ex proprio vigore* to the unincorporated Territories.

Trial by jury, as used in this provision, refers to a jury of twelve men, in the presence of and under the superintendence of a judge empowered to instruct them in the law and to advise them on the facts, and to set aside their verdict if, in his opinion, against the law and the evidence. The "rules of common law," refer, of course, to the common law of England, which permit a new trial, granted by the trial court or by an appellate court for errors in law committed on the first trial.

In Capital Traction Co. v. Hof [70] it was held that the right to a jury is preserved, when an appeal, on giving bond, is allowed from a judgment of a justice of the peace to a court of record, where trial is had by jury. The constitutional provision, it was pointed out, does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. After a careful review of the practice in the States at the time of the adoption of the Constitution, and since, the court held that the provision of an act of Congress requiring every appellant from the judgment of a justice of the peace in the District of Columbia to give security to pay and satisfy the judgment of the appellate court was consistent with that preservation of the right of trial by jury required by the Seventh Amendment.[71]

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[70] 174 U. S. 1. The court in this case went on to point out that, even were a jury used in the court of the justice of the peace, as was permitted by the statute creating that court, the constitutional requirements relating to jury trials would not be satisfied since that statute did not require the justice to superintend the course of the trial or to instruct the jury in matters of law, or authorize him, upon the return of their verdict to arrest judgment upon it or to set it aside for any course whatever, but made it his duty to enter judgment upon it forthwith and as a matter of course. A body of men thus free from judicial control, the court said, was not a common-law jury, nor did a trial by them satisfy the constitutional requirements with regard to jury trials. This would be so even were the jury to consist of twelve men.

[71] 174 U. S. 1.

§ 458. Waiver of Jury in Civil Cases.

The right to a jury trial in civil cases, whatever the value in controversy, may be waived. No objection to a waiver was made in the early case of Parsons v. Armor;[72] nor later in Bamberger v. Terry;[73] nor in Supervisors of Wayne Co. v. Kennicott.[74] Indeed the right to waive has not been seriously questioned.

§ 459. Appeals and the Seventh Amendment.

The guaranties of the Seventh Amendment, like other provisions of the Constitution, are interpreted in the light of common-law practices or understandings at the time the Amendment or the Constitution was adopted. In fact, by the Amendment itself it is declared that the verdicts of juries as to facts may be re-examined according to the rules of the common law. In accordance with these practices or understandings the courts, from the beginning, have found no difficulty in holding that the verdicts of juries may be set aside by the presiding judge and new trials ordered upon the ground that such verdicts are contrary to the evidence, or not supported by evidence sufficient in law to support them, and also that, upon appeal from the refusal of the judge to grant a new trial, appellate courts may, upon such grounds, set aside a verdict and direct a new trial.[75]

§ 460. Right of Judges to Direct Verdicts.

It is evident that when a jury is directed by the presiding judge to return a specified verdict, no opportunity is given to the jury to express a real judgment upon the facts. It might seem, therefore, that, in such cases, the constitutional right to a jury trial is infringed. In fact, the exercise of this authority, though unknown to the common law at the time the Seventh Amendment was adopted, has been exercised by Federal judges since 1850 when it has appeared that, as a matter of law, the evidence adduced can support no other than the directed verdict.[76]

§ 461. Instructions to Juries.

In not a few of the States the judges are forbidden by statute or constitutional provision to express to juries their personal opinions as to the credibility of witnesses or as to the weight of the testimony that has been presented. This practice has not prevailed in the Federal courts, although the judge is required to make plain to the juries that they are not bound by his opinions, they being the final and sole judges of questions of fact.

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[72] 3 Pet. 413.

[73] 103 U. S. 40.

[74] 103 U. S. 554.

[75] See Parsons v. Bedford (3 Pet. 433); Walker v. New Mexico & S. P. R. Co. (165 U. S. 593); Capital Traction Co. v. Hof (174 U. S. 1); Slocum v. N. Y. Life Ins. Co. (228 U. S. 364); Pedersen v. D. L. & W. R. Co. (229 U. S. 146); Myers v. Pittsburgh Coal Co. (233 U. S. 184).

[76] Improvement & R. R. Co. v. Munson (14 Wall. 442); Coughran v. Bigelow (164 U. S. 301); Patton v. Texas & P. R. Co. (179 U. S. 658); Pleasants v. Fant (22 Wall. 116); Horning v. District of Columbia (254 U. S. 135).

There have, however, been cases in which the Federal judges in the trial courts have expressed their opinions in such strong terms that the Supreme Court, upon writ of error, has held that the disclaimer that the juries were not to hold themselves bound by the opinions thus expressed was ineffective to leave them as free as they constitutionally should have been left to determine for themselves the questions of fact in dispute.[77]

In *Re* Peterson [78] it was held that the jury's constitutional right to determine issues of fact was not unduly interfered with by the appointment of an auditor to form and express an opinion upon facts and items in dispute, the report of such auditor being submitted at the trial only as *prima facie* evidence of the facts and findings embodied therein. Nor, it was held, was the jury trial unduly modified by the holding of preliminary tentative hearing before such auditor.

§ 462. Legislative Power to Declare what Prima Facie or Conclusive Deductions Are to Be Drawn from Specified Facts.

The province of the jury, so far as it is constitutionally guaranteed, is to determine, from the evidence presented, the facts in issue. The legal significance of these facts it is within the authority of the judge, guided by the common and statute law, to determine. When, however, the legislature attempts to declare what facts are to be inferred from other specified facts, a basis is laid for the contention upon the part of the one adversely affected by this legislative direction that he is deprived of due process of law, or that his right to a determination of the facts by a jury is denied.[79]

§ 463. Jury Trials under Conditions that Prevent Independent and Impartial Action.

When the conditions under which a jury trial is held is such as clearly to prevent the jury, either by reason of personal fear or the pressure of excited public feeling, from rendering an independent and impartial verdict, it would seem that the right to the jury trial is deprived of one of its essential qualities. In such cases, however, it has been usual upon the part of the one who alleges himself to have been disadvantaged to assert a denial of due process of law rather than to rely upon the claim that, in substance, he has been denied his constitutional right to have the facts at issue passed upon by a jury. This phase of the subject will, therefore, be treated later on in connection with the discussion of Due Process of Law.[80]

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[77] Starr v. United States (153 U. S. 614).

[78] 253 U. S. 300.

[79] State v. Strasburg (110 Pac. Rep. 1022).

§ 464. The Right to Jury Trial and Administrative Determinations.

Elsewhere in the present treatise consideration is given to the question of the extent to which it is constitutionally permissible for statutory provision to be made for the determination of private rights and the enforcement of law through administrative rather than judicial processes. This question has especial reference to the matter of fulfilling the requirements of due process of law as provided by the Fifth Amendment, so far as the Federal Government is concerned, and by the Fourteenth Amendment, so far as the States are concerned. It will there appear that administrative agencies, as distinguished from purely judicial tribunals, may constitutionally exercise functions that are judicial, or at least, *quasi*-judicial in character.

It is established that, when exercising these judicial or *quasi*-judicial functions, administrative agencies are not required to employ juries for the determination of facts.[81]

§ 465. Jury Trial Not Required in State Courts by the Seventh Amendment.

That the first ten amendments to the Constitution, and including therefore the Seventh Amendment, operate as limitations upon the Federal Government and not upon the States is, of course, well established.[82] However, in Minneapolis & St. L. R. Co. v. Bombolis,[83] it was urged that, when a State court was enforcing rights under a Federal statute, it was obligated by the Seventh Amendment to employ a jury of twelve, from which a unanimous verdict would be required for the determination of the facts at issue.[84] The Supreme Court, denying this contention, said: "The limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore . . . its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States."

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[80] See Chapter LXXIX.

[81] Murray's Lessee v. Hoboken Land & Improvement Co. (18 How. 272).

[82] Leading cases as to this are Barron v. Baltimore (7 Pet. 243); Fox v. Ohio (5 How. 410); Twitchell v. Pennsylvania (7 Wall. 321); Brown v. New Jersey (175 U. S. 172); Twining v. New Jersey (211 U. S. 78). As to the Seventh Amendment in particular, see Livingston v. Moore (7 Pet. 469); Supreme Justices v. Murray (9 Wall. 274); Edwards v. Elliott (21 Wall. 532); Walker v. Sauvinet (92 U. S. 90); Pearson v. Yewdall (95 U. S. 294).

[83] 241 U. S. 211.

[84] The State practice provided in certain cases for a less than unanimous verdict.

§ 466. Speedy Trial.

The Sixth Amendment secures to the accused a speedy as well as a public trial. This provision has received very little discussion in the Federal courts, and, so far as the author is aware, no case in which its violation has been asserted has reached the Supreme Court.

§ 467. Public Trial.

The Constitution expressly provides that criminal trials shall be publicly conducted, and, indeed, it would seem that publicity has been a common law incident of trials for crime. Many of the State constitutions also expressly provide that proceedings shall be public. In numerous cases, however, it has been held by the State courts that this does not prevent the more or less complete exclusion of spectators where public morals seem to require it, and where no prejudice to the accused is thereby occasioned. The question has not been passed upon by the Federal Supreme Court although it was discussed in the recent case of Gaines v. Washington.[85]

§ 468. Double Jeopardy.

It is provided by a clause of the Fifth Amendment that no person shall be subject for the same offence to be twice put in jeopardy of life or limb.

Cases may occur in which the same act may render the actor guilty of two distinct offences; as, for example, the passing of counterfeit coin of the United States, which may be both an offence against the United States, and, as a fraud on its citizens, an offence against a State. In such cases the accused cannot plead the trial and acquittal, or the conviction and punishment for one offence in bar to a conviction for the other.[86]

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[85] 277 U. S. 81, 85, 86.

[86] Fox v. Ohio (5 How. 410); United States v. Marigold (9 How. 560); Moore v. Illinois (14 How. 13, 19). In the last case the court said: "A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

A number of cases involving claims that double jeopardy has been suffered have arisen under the Volstead Prohibition Act. These have arisen not only when the accused has been held criminally liable for the same act in both Federal and State courts, but when the same act, or set of acts, has been held to constitute two or more distinct offences. As to this latter holding, the Supreme Court, in Albrecht v. United States,[87] decided in 1917, said: "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has the power to prohibit."

From this class of acts which constitute two or more distinct offences, are to be distinguished those acts which are punishable by the tribunals of two or more countries, or by two or more tribunals of the same country. Here the offence is a simple one, but cognizable in two jurisdictions. In such case an acquittal or punishment in one may be pleaded in bar to a prosecution in another court based upon the same act. Thus, in Grafton v. United States [88] it was held that one acquitted by a military court of competent jurisdiction could not be tried a second time in a Federal civil court for the same offence.[89]

This doctrine as to double jeopardy holds even though the punishment which may be inflicted by the one court is different from or greater than that which may be imposed by the other; or even if the indictment in the one court charge a different crime from that stated in the other.

In United States v. Clark,[90] however, there is a dictum to the effect that an acquittal by a military court does not operate as a bar to a criminal prosecution in a civil court based upon the same act. In Wilkes Dinsman,[91] there is a dictum to the opposite effect. It would appear, however, that it is the opinion of the military authorities, supported by an opinion of the Attorney General [92] that an act which is punished in the civil courts can also furnish a basis for proceedings in a military tribunal when there is ground for holding that the act is also an offence against the military law, that is, that two distinct offences have been committed.

In Commonwealth v. Roby [93] the court said: "An acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder." [94]

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[87] 273 U. S. 1.

[88] 206 U. S. 333.

[89] The court refused assent to the view that the accused had committed two distinct offences—one against military law and discipline, the other against the civil law.

[90] 31 Fed. Rep. 710.

[91] 7 How. 89.

[92] 6 Op. Atty. Gen. 413.

[93] 12 Pick. (Mass.) 496.

In United States v. Lanza [95] it was held that a person could be punished for the same act in both the Federal and State courts under the National Prohibition Act and a State prohibition law. The court said: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." [96]

In Graham v. West Virginia [97] it was held that a former convict was not placed twice in jeopardy by being brought, after conviction, before the court of another county in a separate proceeding by information charging him with prior convictions which had not been alleged in the indictment on which he had been previously tried and convicted, and, on the finding of the jury in the new proceedings that he was a former convict, being sentenced to additional punishment in accordance with a law providing for such punishment to habitual criminals.

§ 469. What Constitutes Jeopardy.

What constitutes "jeopardy" is, in accordance with the general principle of constitutional construction, to be determined by the usage of the word and the custom of the common law at the time the Constitution was adopted. By the common law not only was a second punishment for the same offence prohibited, but a second trial forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted.[98]

It is not necessary, in order that prior jeopardy may be pleaded in bar, that there should have been a former trial and verdict by a jury. This is not the rule uniformly stated, but, as declared by the Supreme Court in Kepner v. United States,[99] "the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal." [100] "Undoubtedly," the court added, "in those jurisdictions where a trial of one accused of crime can only be by a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been put in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit." [101]

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[94] Citing Starkie, *Crim. Pl.*, 2d ed. 322.

[95] 260 U. S. 377, 382.

[96] See also Hebert v. Louisiana (272 U. S. 312).

[97] 224 U. S. 616.

[98] *Ex parte* Lange, 18 Wall. 163.

[99] 195 U. S. 100, 128.

Where, upon a former trial, the jury had reported disagreement, and it appeared reasonably certain that an agreement could not be obtained, and the jury had been discharged by the court, a plea of former jeopardy was held not good.[102]

In Hotema v. United States [103] it was held that a plea of former jeopardy to an indictment for murder could not be based upon the fact that, upon the trial of two consolidated indictments for two other murders committed by the defendant on the same day as the one charged in the indictment in question, he was found not guilty because insane, which defence was again set up.

In Collins v. Loisel [104] it was held that the constitutional provision against double jeopardy does not apply unless the accused has been previously placed on trial, and that a preliminary examination of one arrested on suspicion of crime and his discharge by the magistrate does not constitute such a trial and acquittal.[105] The court added: "Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in Bassing v. Cady,[106] not to constitute jeopardy."

In Lovato v. New Mexico [107] it was held that the accused had not been twice placed in jeopardy because, after the overruling of demurrer to the indictment which had been entertained after a plea of not guilty had been entered and not withdrawn, the jury which had been impanelled and sworn was dismissed, and the accused forthwith arraigned and required to plead, and, both sides announcing themselves ready for trial, the same jury was sworn and the trial proceeded with.

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[100] Citing Coleman v. Tennessee (97 U. S. 509).

[101] Citing People v. Miner (144 Ill. 308); State v. Bowen (45 Minn. 145); State v. Layne (96 Tenn. 668).

[102] United States v. Perez (9 Wh. 579); Keerl v. Montana (213 U. S. 135).

[103] 186 U. S. 413.

[104] 262 U. S. 426.

[105] Citing Com. v. Rice (216 Mass. 480) and People v. Dillon (197 N. Y. 254).

[106] 208 U. S. 386.

[107] 242 U. S. 199.

In Stroud v. United States [108] it was held that a person found guilty of murder in the first degree but, under Section 330 of the Criminal Code with punishment mitigated to life imprisonment, was not placed in double jeopardy by an unqualified convictiod of murder in the first degree, carrying the death penalty, in a new trial had after the conviction had at the first trial had been reversed upon a writ of error sued out by the accused.

§ 470. Jeopardy and the Right of Appeal.

It is established that, in criminal cases, the State has no right of appeal where the accused may fairly be said to have been placed in jeopardy. This, the doctrine of the common law, has been repeatedly accepted by the United States Supreme Court.[109] A verdict or a judgment in a trial court in favor of the accused is, therefore, as to him, final and conclusive. But acquittal before a court without jurisdiction is absolutely void and, therefore, no bar to a subsequent indictment and trial before a court having jurisdiction. The fact that an indictment was fatally defective does not render the judgment void, but voidable only. This the government could not set up on a writ of error, and, of course, the defendant would not. The judgment cannot be collaterally attacked.[110]

Where, upon conviction, the defendant has taken an appeal, and a new trial has been ordered, he may be found guilty of an offence of a higher degree than that originally found against him. Thus a verdict of manslaughter having been rendered, and appeal taken, and a new trial awarded, a verdict of murder may be returned. This is the doctrine definitely declared in Trono v. United States,[111] the court, after a review of authorities, saying: "We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed."

As to the right of the defendant thus, by seeking a new trial, to waive the constitutional protection afforded him by the first judgment, the court admitted that by seeking a new trial the accused may and does waive his right to the plea of former jeopardy as to the crime of which he has been convicted.[112] The only question is as to the extent of that waiver, and, the court said, it "seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense." The doctrine of Hopt v. Utah [113] that a man may not waive his fundamental constitutional rights, does not, therefore, govern.[114]

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[108] 251 U. S. 15.

[109] See United States v. Sanges (144 U. S. 310), and authorities there cited.

[110] United States v. Ball (163 U. S. 662).

[111] 199 U. S. 521, 533.

§ 471. The Constitutionality of Appeal by the Government in Criminal Cases.

In the dissenting opinion filed by Justices Holmes, White and McKenna, in Kepner v. United States,[115] it was argued that it is within the constitutional power of Congress to provide for a writ of error on behalf of the government in criminal trials, whereby errors of law committed in the trial court may be corrected, and, when proper, a new trial of the accused ordered. Though the verdict or judgment may have been in his favor upon the first trial, the accused, it was declared, is not, by the new trial, subjected to a second jeopardy. The jeopardy, it was argued, is one continuing jeopardy, from the beginning to the end of the cause. The principle of the immunity from second jeopardy in its origin, it was declared, was that a trial in a new and independent case could not be had where a man had already been once tried; not that he may not be tried twice in the same case. In fact, the argument continued, he may be tried a second time where the jury disagrees, or the verdict is set aside on the prisoner's bill of errors, or, indeed, he may be tried on a new indictment if the judgment on the first is arrested upon motion.[116]

Despite this argument, the weight of authorities, both State and Federal, is overwhelming that, as stated earlier in this chapter, a verdict or judgment in a lower court of competent jurisdiction is final and conclusive as to the defendant.

§ 472. Life or Limb.

The Constitution declares that one shall not twice be placed in jeopardy of "life or limb." This phrase has been construed to mean any punishment.[117]

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[112] Citing United States v. Ball (163 U. S. 662).

[113] 110 U. S. 574.

[114] It is to be observed that in the Trono case four justices dissented, and Justice Holmes is recorded only as concurring in the result.

[115] 195 U. S. 100.

[116] *Ex parte* Lange (18 Wall. 163).

[117] *Ex parte* Lange (18 Wall. 163).

§ 473. Self-Incrimination.

By the Fifth Amendment it is provided: "Nor shall any person . . . be compelled, in any criminal case, to be a witness against himself." The guaranty thus furnished is one independent of the guaranty of "due process of law" and is thus one which, so far as the Federal Constitution is concerned, is not secured to the individual in the State courts.[118]

If an answer will tend merely to disgrace but not to incriminate the witness, the privilege does not apply. If, however, the answer is one which can have no bearing upon the case except to impair the credibility of the witness, he may refuse to answer.[119]

The immunity which is provided has for its object the protection of the individual against criminal prosecution based upon evidence which has been compulsorily obtained from him. Thus the provision is no bar to the use in a subsequent prosecution of evidence that has been voluntarily given by the accused; nor does it prevent the courts from compelling testimony with reference to acts no longer punishable, or where, by statute, subsequent use of the evidence so obtained in criminal actions has been forbidden. Thus also the immunity does not relate to evidence the tendency of which is merely to discredit the moral character of the witness.[120]

In Hale v. Henkel [121] the court declared the broad doctrine that the line is drawn at testimony that may expose the witness to criminal prosecution. "If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run or for which he has already received a pardon, or is guaranteed an immunity, the amendment does not apply. . . . The criminality provided against is a present, not a past criminality, which lingers only as a memory, and involves no present danger of prosecution."

The constitutional privilege against self-incrimination is available to anyone who may be incriminated by the testimony or other evidence that is asked for. It is not limited to a defendant at bar or to parties defendant. Furthermore, the constitutional privilege applies as well to testimony or other evidence called for in civil proceedings as in criminal actions. "It applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant." [122]

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[118] Twining v. New Jersey (211 U. S. 78).

[119] See authorities cited in Brown v. Walker (161 U. S. 591).

[120] The State authorities are in conflict as to this.

[121] 201 U. S. 43, 67.

[122] McCarthy v. Arndstein (266 U. S. 34). *Cf.* Counselman v. Hitchcock (142 U. S. 547).

It is well established that a witness, having voluntarily taken the stand, may be compelled to disclose the whole facts regarding the matters concerning which he has testified.[123]

It is established that the exercise by the accused of his constitutional right not to take the stand in his own defence may not be adversely commented upon by the court or by opposing counsel. When, however, he does elect to testify, but fails to explain in a satisfactory manner incriminating circumstances, that fact may be pointed out to the jury.[124]

In Burdick v. United States [125] it was held that the tender of a pardon for the offence involved does not destroy the privilege of a witness against self-incrimination unless the pardon is accepted by him.

In 1807 in Burr's Trial [126] Chief Justice Marshall laid down the broad doctrine, which has been generally acquiesced in, that where the witness avers under oath that the answer to the question which has been propounded to him will tend to incriminate him, no other testimony may be demanded of him by the court as to this fact. "If the question be of such a description that an answer to it may or may not incriminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not."

The fact that the immunity from prosecution afforded by a Federal statute gives the witness no security from prosecution in the State courts as to matters regarding which he is asked to testify, is immaterial.[127]

Where the right to compel testimony is based upon a statute granting immunity from subsequent prosecution, the immunity granted must be complete. Absolute protection against later criminal actions for the offence to which the testimony relates must be provided.[128]

In Glickstein v. United States [129] it was held that the immunity required by the Fifth Amendment relates only to past offences and need not extend to the exemption of a witness from prosecution for perjury committed while testifying. It was therefore held that the immunity clause in the Bankrupt Act of July 1, 1898,[130] did not bar a prosecution for perjury.

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[123] See authorities cited by the court in Brown v. Walker (161 U. S. 591 on p. 597). See also Fitzpatrick v. United States (178 U. S. 304); Sawyer v. United States (202 U. S. 150); Powers v. United States (223 U. S. 303).

[124] Caminetti v. United States (242 U. S. 470).

[125] 236 U. S. 79.

[126] Burr's Trial, Fed. Cas. No. 14,692e.

[127] Brown v. Walker (161 U. S. 591). The converse of this, namely, that because the immunity granted by a State statute to prosecution does not extend to prosecutions in the Federal courts the witness is not excused from testifying, is declared in Jack v. Kansas (199 U. S. 372). This doctrine is approved in Hale v. Henkel (201 U. S. 43), the court saying: "Indeed, if the argument were a sound one, it might be carried still further and held to apply not only to State prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself." The English doctrine is the same. See *Wigmore on Evidence.*

[128] Counselman v. Hitchcock (142 U. S. 547); Brown v. Walker (161 U. S. 591).

[129] 222 U. S. 139.

In Heike v. United States [131] the petitioner contended that as soon as he had testified upon a matter under the Sherman Act he had an amnesty by the act of February 25, 1903,[132] from liability for any and every offence that was connected with that matter in any degree, or, at least, for an offence toward the discovery of which his testimony had led up even though it had, in fact, had no actual effect in bringing the discovery about. This contention the court denied, saying that the evidence in question had not concerned any matter at issue in the instant case. "When," said the court, "the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law." [133]

§ 474. Refusal to Produce Books and Papers.

In Boyd v. United States [134] the Supreme Court held that the right of the individual to immunity from compulsory self-incrimination includes the right to refuse to produce private books and papers which would have, or tend to have, the effect of incriminating himself.

However, it has been held that this principle does not invalidate a law compelling bankrupts to surrender books and papers.[135] As the court has said in McCarthy v. Arndstein:[136] "The cases which hold that a bankrupt must surrender books and papers, although they contain incriminating evidence, rest upon a principle different from that here involved. . . . The law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate.[137] To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property." [138] The court then went on to point out that, when a bankrupt appears as a witness before a commissioner, he, like any other witness, can assert his constitutional right to immunity from self-incrimination.[139]

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[130] 30 Stat. at L. 548.

[131] 227 U. S. 131.

[132] 32 Stat. at L. 904.

[133] See Sherwin v. United States (268 U. S. 369) as to the immunity provided by the Federal Trade Commission Act (38 Stat. at L. 717).

[134] 116 U. S. 616.

[135] *Re* Harris (221 U. S. 274); Johnson v. United States (228 U. S. 457); *Re* Fuller (262 U. S. 91); Dier v. Banton (262 U. S. 147).

[136] 266 U. S. 34, 41.

[137] Section 70a of the Bankruptcy Act of July 1, 1898 (30 Stat. at L. 544).

[138] See also Johnson v. United States (228 U. S. 457).

§ 475. Corporations Not Protected against Testimony by Their Agents.

In Hale v. Henkel [140] it was urged that, while the immunity statute might protect the individual witness, it would not protect the corporation of which he was the agent and respresentative. To this the court answered that it was not the intention of the statute to do this nor was there a constitutional necessity that this should be done. The right guaranteed by the Fifth Amendment, it was declared, is purely a personal one of the witness. "It was not intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person."

In Baltimore & Ohio R. Co. v. Interstate Commerce Commission [141] it was held that carriers subject to a statute regulating hours of labor, could not claim the privilege against self-incrimination as a justification for refusing to render monthly reports, under oath, as required by the law, showing the instances where employees had rendered excess service, or where there had been no such instances, making oath to that effect.

In Consolidated Rendering Co. v. Vermont [142] the company had been served with notice to produce certain books and papers which were material evidence upon a subject of inquiry by the grand jury. This, the company had failed to do, and, after a hearing in court, at which opportunity had been given it to set up any reasonable cause for its failure, had been found guilty of contempt and fined accordingly. Upon writ of error to the Supreme Court of the State which had affirmed this judgment for contempt, the United States Supreme Court said, with reference to the claim of the company that its right to immunity from self-incrimination was involved, that, even if the company could take the objection, it appeared that the court below had simply held that until the books and papers were produced it could not determine whether the objection had a substantial basis. "If, after that inspection, any portion were found of that character, the court held that such portion would be excluded. As, however, the company failed and refused absolutely to produce any books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice and was fined for the contempt. Obviously the company could not, by its refusal to produce the books, thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such non-production. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses."

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[139] The Bankruptcy Act of 1898 does not grant that complete immunity which is necessary to support compulsory testimony of a self-incriminating character.

[140] 201 U. S. 43. See also Consolidated Rendering Co. v. Vermont (207 U. S. 541); Wilson v. United States (221 U. S. 361); and Wheeler v. United States (226 U. S. 478).

[141] 221 U. S. 612.

[142] 207 U. S. 541.

In Essgee Company v. United States [143] the doctrine was again affirmed that "an officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity, and is not, therefore, protected against their production or against a writ requiring him, as agent of the corporation, to produce them. Appellants cite the cases of Boyd v. United States,[144] Weeks v. United States,[145] and Gouled v. United States [146] to support their contention that the proceedings complained of herein violate their rights under the 4th and 5th Amendments. Those cases were all unreasonable searches of documents and records belonging to individuals. The distinction between the cases before us and those cases lies in the more limited application of the amendments to the compulsory production of corporate documents and papers as shown in the Henkel, Wilson and Wheeler cases."

§ 476. Compulsory Taking of Finger Prints, etc.

Though there are no direct cases in the United States Supreme Court upon the point, there are State decisions which support the doctrine that the accused's right to immunity from self-incrimination is not violated when he is compelled to exhibit himself or a part of his body to the jury,[147] or to allow a record of his finger prints to be taken.[148]

The question as to the use that may be made of papers and other evidence unlawfully obtained, will be considered in the next sections dealing with Unreasonable Searches and Seizures.[149]

§ 477. Unreasonable Searches and Seizures.

The question as to the right of the government to compel the production of books and papers is closely connected with the provision of the

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[143] 262 U. S. 151, 158.

[144] 116 U. S. 616.

[145] 232 U. S. 383. For a criticism of the Supreme Court's logic in the Weeks case see the opinion of Judge Cardozo in People v. Defore (242 N. Y. 13).

[146] 255 U. S. 298.

[147] State v. Ah Chuey (14 Nev. 79); Garvin v. State (52 Miss. 207); State v. Graham (74 N. C. 646). But there are decisions *contra*. *Cf.* 27 *Yale Law Journal*, 412.

[148] People v. Sallow (165 N. Y. Supp. 915).

[149] Section 477.

Fourth Amendment with reference to unreasonable searches and seizures.

The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The historical reasons for this constitutional provision are well known. In England, agents of the government, acting under general warrants, had frequently invaded private dwellings in order to obtain evidence against persons charged with committing or suspected of having committed political offences, and the illegality of such general searches had not been determined until the case of Entick v. Carrington,[150] decided in 1765. The part played in the American Colonies by writs of assistance which gave to customs officials the right to search any houses they pleased for smuggled goods needs no dwelling upon. It was therefore but natural that, when the adoption of the Constitution which was to provide a strong central government was under discussion, the people should have demanded that, by express provision, the new government should be denied the right to authorize unreasonable searches and seizures. The points to be emphasized regarding this historical basis for the Fourth Amendment are: first, that the apprehension which was felt was with regard to the exercise of oppressive and unreasonable power by the government; and second, that no question was raised as to the admissibility, as legal evidence, of such papers or other materials as might be obtained by searches and seizures, whether reasonable or unreasonable.

It is, however, a rather remarkable fact that it was not until nearly a hundred years after the Constitution had been adopted that the Supreme Court found it necessary to give a careful examination to the Fourth Amendment. This was in the case of Boyd v. United States,[151] decided in 1886, in which, under the act of Congress of June 22, 1874,[152] the plaintiffs in error had, against their protest, been required to produce the invoice of certain cases of goods, which invoice had been used as evidence against the plaintiffs upon a charge of defrauding the customs, of which charge they had been convicted. There was thus raised the double issue as to whether the plaintiffs in error had been unconstitutionally compelled to incriminate themselves, and, secondly, whether the compulsory production of the invoice had amounted to an unreasonable search and seizure. In both respects it was held that the rights of the plaintiffs had been unconstitutionally invaded.

The holding of the court in Boyd v. United States as to the inadmissibility of evidence illegally obtained has met with much criticism from the bar, the majority of the courts of the States have not followed it in this respect, and the Supreme Court itself has found it desirable to modify it in some regards.

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[150] 19 Howard St. Tr. 1030.

[151] 116 U. S. 616.

[152] 18 Stat. at L. 186.

In Adams v. New York,[153] decided in 1904, it seemed as though the Boyd doctrine as to inadmissibility was to be substantially repudiated. However, in Weeks v. United States,[154] the Supreme Court again took a strict view of the rights of the government with reference to the securing of evidence, and held that the rights of the accused under the Fourth Amendment had been denied by the refusal of the accused's seasonable application for the return to him of letters and private documents which had been taken from his house during his absence by the United States marshal who had had no warrant for the arrest of the accused and none for the search of his house. Distinguishing this case from the Adams case, the court pointed out that, in that case, there had been no application in due season for the return to the accused of the papers which had been illegally seized. The decision in the Adams case, the court declared, had rested upon the application of the doctrine that a collateral issue could not be raised in a criminal trial to ascertain the source whence competent evidence had come. Referring to the Boyd case, the court said that, if a seizure under the authority of a warrant or subpœna *duces tecum* constituted a violation of the constitutional prohibition of the Fourth Amendment, a *fortiori* would this be so in the case of a United States marshal who, though acting under color of his office, had not had even the sanction of a warrant.

In Schenck v. United States [155] the attempt was made to have documents obtained upon a search warrant, valid as far as appeared, inadmissible as evidence against the accused, simply upon the ground that they had been thus compulsorily obtained.[156] The court said: "The notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound." [157]

A somewhat different phase of the subject was presented in the case of Silverthorne Lumber Co. v. United States [158] in which it was held that knowledge gained by the Federal Government's own wrong in seizing papers in an unconstitutional manner might not be used by the government in a criminal proceeding by serving subpœnas upon the owners of the papers to produce the originals thereof, which, upon order of the court, had been returned by the government.[159] To require such production under compulsory process, the court said, would be to reduce the Fourth Amendment to a mere form of words.

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[153] 192 U. S. 585.

[154] 232 U. S. 383.

[155] 249 U. S. 47.

[156] The search warrant had been issued not against the defendant Schenck but against the Socialist headquarters of which he had charge; and, technically, the document had not been in the defendant's possession.

[157] Citing Holt v. United States (218 U. S. 245).

[158] 251 U. S. 385.

It will have been observed that, in the foregoing cases, the court had declared the rule that, for purpose of admissibility as evidence against an accused, the source whence or mode in which the evidence has been obtained would not be considered upon a motion first made at the time their use in a criminal trial is proposed. In Gouled v. United States,[160] however, it was held that this rule would not apply where the evidence had been obtained by stealth and the accused had not learned that it had been obtained until it was offered in evidence by the government. It was also held in this case that the prohibition of the Fourth Amendment was violated by a representative of the government who had gained entrance to the home or office of a person suspected of a crime under the guise of a social or business call, and, subsequently, in the absence of the suspected person, had made a search and seized papers to be used in evidence against him. The search and seizure under such circumstances, the court declared, was as much a violation of the Amendment as if force or show of force amounting to coercion had been employed.

In Amos v. United States,[161] decided at the same time as the Gouled case, the court held that a petition by the accused for the return of papers illegally obtained was not presented too late, and should have been granted when presented after the jury was sworn but before any evidence had been offered.

In Burdeau v. McDowell [162] the doctrine was again declared that the Fourth Amendment gives protection only against governmental action. In this case the record showed no such official action, and it was held that the government might retain in its possession for use in a subsequent investigation by a grand jury incriminating evidence which, though illegally obtained in the first instance by private parties, had been turned over to the government.

§ 478. Searches and Seizures under the Volstead Act.

Since the enactment of the Volstead Act [163] for the enforcement of the Eighteenth Amendment, the question as to the circumstances under which searches and seizures may constitutionally be made has obtained a greatly increased importance, and has given rise to many controversies in the courts, some of which have reached the Supreme Court.

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[159] Copies of these papers had been made before they were returned, but these copies had been impounded by the court.

[160] 255 U. S. 298. In this case it was also held that evidence secured under a valid search warrant might be used in the prosecution of a suspected person for an offence other than that described in the affidavit upon which the search warrant was issued.

[161] 255 U. S. 313.

[162] 256 U. S. 465.

[163] October 28, 1919, (41 Stat. at L. 305).

In Carroll v. United States,[164] decided in 1925, the court reviewed the well-established doctrine that, when one is legally arrested for an offence, whatever is found in his possession or in his control may be seized and used in evidence against him, and also the recognized right of an officer to make an arrest without a warrant of a person believed by the officer upon reasonable grounds to have committed a felony, or one who has, in the officer's presence, committed a misdemeanor.[165]

In Agnello v. United States [166] it was held that, while the premises where a crime has been committed might be searched and incriminating evidence seized, this principle did not justify the search without a warrant of the house of one of the accused which was some distance from the place where the arrest was made. Hence, it was held, the evidence thus obtained could not be used against one of the accused, and, as it had been so used, the judgment against him was set aside and a new trial ordered.

In Byars v. United States [167] it was held that a warrant issued on an affidavit reciting that affiant had good reason to believe and did believe that the defendant had in his possession intoxicating liquors, etc., was insufficient under the Fourth Amendment and statutes of the United States as a basis for a Federal search and seizure.[168] The doctrine was, however, reaffirmed that the Federal Government may avail itself of evidence improperly seized by State officers operating entirely on their own account, but that the rule is otherwise when the Federal Government itself, through its own agents, participates in the wrongful search or seizure.[169]

In McGuire v. United States [170] it was held that the illegal destruction of intoxicating liquors by officers acting under a valid search warrant did not render their search so far void *ab initio* as to prevent the use as evidence against the owner of samples of the liquor which they had retained.

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[164] 267 U. S. 132.

[165] See Kurtz v. Moffitt (115 U. S. 487); John Bad Elk v. United States (177 U. S. 529).

[166] 269 U. S. 20.

[167] 273 U. S. 28.

[168] Citing 40 Stat. at L. 217, 228, 229; 41 Stat. at L. 305, 318; Ripper v. United States (C. C. A. 178 Fed. 24); United States v. Borkowski (268 Fed. 408); United States v. Kelly (277 Fed. 485).

[169] As to this, see also McGuire v. United States (227 U. S. 95), and Gambino v. United States (275 U. S. 310).

[170] 273 U. S. 95.

In Marron v. United States [171] it was held that, though not specified in the search warrant, the officers acting thereunder were justified in seizing, and the government later justified in using as evidence against the accused, a certain ledger and bills which were found in the accused's place of business and which were connected with the carrying on of the illegal business charged against the accused. The court said that this action was justified as within the doctrine of Adams v. New York,[172] and that the ledger and bills had been lawfully seized since they were a part of the outfit or equipment actually used to commit the offence charged, and were in his immediate possession and control even though not upon his person.

In Hester v. United States [173] it was held that testimony of two officers who had trespassed upon the defendant's land, and had concealed themselves one hundred yards from his house, and, from that vantage point had seen certain acts upon his part, might be admitted in a criminal prosecution against him. The court said that, while there had been a trespass, there had been no search of the person, of a house, or of papers or effects.

In Olmstead v. United States [174] evidence was admitted which had been obtained by Federal officers by secretly "tapping" the telephone wires leading to the residence and offices of the accused, and thus overhearing conversations carried on by them. The court pointed out that the installation of the small wires inserted, for the tapping purpose, along the ordinary telephone wires from the residences of the accused had involved no trespass upon the properties of the defendants, and that those making connection with their offices had been installed in the basement of the large office building in which those offices were situated. The Fourth Amendment, the court declared, while having a proper application to sealed mail "because of the constitutional provision for the Post Office Department and the relation between the Government and those who pay to secure protection of their sealed letters," [175] has no such application to telegraph or telephone messages. "The Amendment does not forbid what was done here. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." However, the court added, should Congress deem it desirable that the secrecy of telephone and telegraph messages should be protected, it was within its legislative power to do so.

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[171] 275 U. S. 192.

[172] 192 U. S. 585.

[173] 265 U. S. 57.

[174] 277 U. S. 438.

[175] The court continued: "See Revised Statutes, §§ 3789 to 3988 whereby congress monopolizes the carriage of letters and excludes everyone else, and § 3929. U. S. C., title 39, § 259, which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the Amendment to say that the unlawful rifling of a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a government that forbids carriage except under its protection."

Four justices dissented in this case, the dissenting opinion of Justice Brandeis being an elaborate and emphatic one.

§ 479. Corporations Protected by the Fourth Amendment.

In Hale v. Henkel [176] the court, while refusing to hold that corporations are protected by the Fifth Amendment from incrimination by the compulsorily obtained papers and testimony of their agents, went on to say that they were not to be understood as declaring that corporations are not granted immunity from unreasonable searches and seizures, and that a judicial order for the production of books and papers may in certain cases constitute an unreasonable search or seizure. And, in the instant case, the subpœna *duces tecum* was held too sweeping in its terms to be deemed reasonable.

Though not directly involving the Fifth Amendment, the case of the Federal Trade Commission v. American Tobacco Co.[177] is an interesting one in relation to the matter of the compulsory production of papers, books and accounts. In that case it was held that, under the act of September 26, 1914,[178] the Commission had not power to compel a company to produce all their books and papers, including those relating to their intrastate commerce business, with the hope or expectation that they might possibly disclose practices in violation of the act. The court described such an order as a mere "fishing expedition," and said: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

§ 480. Cruel and Unusual Punishments.

The Eighth Amendment to the Federal Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Substantially similar prohibitions are contained in the constitutions of most of the States.

As regards the prohibitions upon the Federal Government few cases have reached the Supreme Court.[179]

The prohibitions are not included within "due process of law," and are not, therefore, made applicable by the Fourteenth Amendment to the States.[180]

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[176] 201 U. S. 43.

[177] 264 U. S. 298.

[178] 38 Stat. at L. 717.

[179] For an elaborate note dealing with decisions of State courts see 35 L. R. A. 561.

The fact that the method of administering the death penalty, for example, by electrocution, is new, does not bring it within the constitutional prohibition, unless it also inflicts what amounts to lingering torture. "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." [181]

The infliction of a heavier penalty upon a person convicted of felony who has before been convicted of felony, is not the imposition of a cruel and unusual punishment.[182]

The case of Weems v. United States [183] probably contains the most interesting discussion which the prohibition of cruel and unusual punishments has received by the Supreme Court. The case is significant, or potential of future importance, in that it recognizes an authority in the courts, derivable from the Eighth Amendment, to hold unconstitutional punishments, legislatively provided, which, in the opinion of the court, are unduly severe. The court thus held that the constitutional inhibition applies not only when a mode of punishment is provided for, which, in itself, is cruel or unusual, but where a penalty, not in itself cruel or unusual, becomes such by being unduly severe.

In the Weems case the majority held that a cruel and unusual punishment was unconstitutionally provided for by the Philippine Penal Code which, for falsification by a public official of a public and official document, imposed fine and imprisonment at hard and painful labor for a period ranging from twelve years and a day to twenty years; which required that, during such imprisonment, the prisoner should carry a chain at the ankle, hanging from the wrist, and be deprived of civil rights; and that he be disqualified to enjoy political rights, to hold office, etc., and be subject to surveillance of the authority during the remainder of his life.

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[180] *Ex parte* Kemmler (136 U. S. 436).

[181] *Ex parte* Kemmler (136 U. S. 436). See also Wilkerson v. Utah (99 U. S. 130).

[182] McDonald v. Massachusetts (180 U. S. 311).

[183] 217 U. S. 349.

CHAPTER LVI

RELIGIOUS LIBERTY, FREEDOM OF SPEECH AND PRESS; RIGHT TO ASSEMBLE AND PETITION, AND TO BEAR ARMS

§ 481. Religious Freedom.

Until recently the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," gave rise to comparatively little litigation in the Federal courts.[1]

In Reynolds v. United States [2] the meaning of the prohibition was carefully considered and the conclusion reached, unavoidable from a practical viewpoint, that the prohibition does not prevent Congress from penalizing the commission of acts which, though justified by the tenets of a religious sect, are socially or politically disturbing, or are generally reprobated by the moral sense of civilized communities. Thus, in this case, it was held that polygamy might be declared illegal and criminal, though declared proper and even meritorious by the Mormon religion.[3]

Under provisions of the State Constitutions prohibiting the creation of State religious establishments, the appropriations of money for sectarian purposes, and in general the infringement of religious liberty and equality, many cases have arisen in which American doctrines of Church and State have been discussed. A consideration of these cases will not be appropriate in this treatise, but it may be said that a peculiarly valuable examination of the doctrines governing the attitude of the courts in dealing with property claimed by two or more contesting religious bodies, is that contained in the opinion of the Supreme Court in Watson v. Jones.[4]

§ 482. Freedom of Speech and Press.

The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Independently of these prohibitions the power of Congress, except in regard to the District of Columbia and the Territories (incorporated or unincorporated), to legislate with regard to freedom of speech and the press would seem to be limited to its implied right to protect the Federal Government against injurious acts and to punish incitements to violate or interfere with the execution of Federal laws. The jurisdiction of the States in the premises, within their several territorial limits, is, of course, much broader and includes, so far as any Federal constitutional limitations are concerned, the right to declare criminal or tortuous such spoken, written or published words as they may deem obnoxious. But the States, by their own Constitutions, have placed upon their legislative bodies prohibitions similar to that imposed upon Congress by the First Amendment to the Federal Constitution. Thus, as to them, there arises the same constitutional question as exists with regard to the Federal Government, namely, as to the scope to be ascribed to the prohibition that the freedom of speech and press shall not be abridged.

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[1] By Clause 3 of Article VI it is also provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

[2] 98 U. S. 145; 25 L. ed. 244.

[3] See also Davis v. Beason (133 U. S. 333).

[4] 13 Wall. 679. See also Gonzalez v. Archbishop (280 U. S. 1, 16).

Prior to the adoption of the Federal and the first State Constitutions, the common law, both of England and of the American colonies, had recognized that certain utterances might be held criminal or tortuous, namely, those that were deemed slanderous, libellous, indecent, blasphemous, or seditious. With regard to the actions founded upon libellous and seditious utterances there had been a long controversy as to whether the truth of the allegations made might be set up by the accused as a defence, whether the determination that the utterances charged are slanderous or seditious should be by the court or by the juries, and whether a censorship in advance of publication might properly be exercised by the government.

Prior to the American Revolution it had become established in both England and America that there should be no censorship of the press, that is, the placing of prior restraints upon publications, and thus we find Blackstone in his *Commentaries*, which were published in 1765–1768, and widely circulated in America, declaring, that "the liberty of the press . . . consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published." In England, the right of the juries to determine not only the fact of publication but the question as to the libellous character of the matter published was not made certain until the enactment of Fox's Libel Act of 1792.

That the truth of the statements made should be a defence in actions for criminal libel had not been determined when the Constitution was adopted, and, indeed, this defence cannot now be availed of in all the States of the Union, and, where it may be set up, it is the result of express statutes to that effect.

As to what constitute seditious libels, no definite rule can be said to have been established prior to 1789. It is clear, however, that more than direct incitements to resistance to law or to the government were included within the crime of seditious libel, and, as to the utterances which were held to be seditious the truth of such statements of fact as might have been made was not a complete defence, if, indeed, the issue could be even raised.

Thus stood the common law at the time the First Amendment to the Constitution was adopted, and it does not need to be said that that state of the law must be taken into consideration when the effort is made to determine the scope of the limitation laid upon Congress by the constitutional provision that it should make no law "abridging the freedom of speech or of the press."

One thing is clear, and that is that it was intended that Congress should have no constitutional power to censure publications, that is, to place previous restraints upon them.[5] It may also be said to be an established principle of American constitutional jurisprudence that in trials for libel, both civil and criminal, the juries are to have the right to determine not only the fact of publication but the libellous character, *vel non*, of the matter published. It cannot be said, however, that this latter doctrine has been founded upon the First Amendment, but rather that it has been drawn from the general spirit of American law and politics, or perhaps included within the other constitutional provisions guaranteeing jury trials. Especially has this been true of seditious libels, namely, those published with the intent to bring officers of the State into hatred or contempt or to excite disaffection against the government or its administration. However, this matter of the province of the jury in libel trials, important as it is, is one of procedure rather than of substance.

That the provisions in American constitutions regarding freedom of speech and press were not intended to protect the malicious utterance or publication of statements slandering or libelling individuals,[6] or the utterance or publication of obscene, blasphemous or seditious statements, is certain. The right of the States to prevent or punish obscene or blasphemous speech and publications falls within their police power. With regard to seditious utterances, however, there has been, and still is, serious controversy as to the constitutional limits of the legislative power to determine what utterances or publications shall be deemed to be seditious in character and punishable as such.

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[5] See Respublica v. Oswald, (1 Dall. 319) (1788); Cobbett's Case, Wharton's St. Trials; Fed. Cas. Nos. 8,646, 14,865, and other cases cited by Schofield, 2 *Constitutional Law and Equity*, 512–514. In Patterson v. Colorado (205 U. S. 454), Justice Holmes declared: "The main purpose of such constitutional provisions [relating to freedom of speech and press] is to prevent all such previous restraints upon publications as had been practiced by other Governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Citing Com. v. Blanding (3 Pick. 304); Respublica v. Oswald (1 Dall. 319).

[6] *Scandalum magnatum*, that is, the slandering of great men, nobles or high officials, never found lodgment as a special offence in American jurisprudence.

§ 483. Seditious Libel.

Sedition, as a criminal offence, is closely allied to treason, and is only distinguished from it by reason of the fact that, though insurrectionary in character, it does not involve an overt act. The crime, therefore, in practically all cases takes the form of speeches made, or publications issued, by individuals, by proclamations issued by associations or societies, by speeches made at meetings, or by resolutions adopted by such meetings, or by the summoning or actual convening of meetings for the avowed or provable purpose of making speeches or adopting resolutions which are such as will be insurrectionary in character, that is, tending to disturb the tranquillity of the State by advising illegal resistance to law, changes by illegal means in the existing form of government or interference with the execution of its policies. That, as thus defined, sedition may be declared a crime by the States or by the Federal Government, notwithstanding the constitutional provisions regarding freedom of speech and press there has never been any doubt. The only constitutional question involved has been as to how far Congress and the State legislatures may go in defining the kinds or classes of utterances or publications which shall be deemed seditious and punishable as such.

Controversy upon the foregoing point has centered to a very considerable extent upon the question whether or not a seditious, and therefore criminal, character may constitutionally be ascribed to an utterance or publication which, while not directly advising resistance to the enforcement of law or insurrection against the government, may reasonably be expected to have the effect of causing or increasing political discontent and opposition to, or possible interference with, the operations of the government.[7]

§ 484. Sedition Act of 1798.

Government being regarded in America as based upon this popular principle, it is but natural that there should have been in America a greater tolerance of public criticism of the government, its officials and its policies, than existed in Great Britian, but that it was the opinion of Congress that the crime of seditious libel might exist in the United States, notwithstanding the First Amendment to the Federal Constitution, was shown by the enactment by that body in 1798 of the drastic Sedition Act.[8]

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[7] As to this, the remarks of Stephen in his *History of the Criminal Law of England* (II, 299) are illuminating.

[8] 1 Stat. at L. 596.

As is well known there was great popular disapproval of this act, and this disapproval was increased by the manner in which the trials under it were conducted by certain of the Federal judges. By many persons the constitutionality of the act was denied upon the double ground that it related to matters outside the Federal power, and that it was in violation of the constitutional provision with regard to freedom of speech and the press. The act was, however, sustained and enforced in the lower Federal courts, but was never passed upon by the Supreme Court. It would be worth while to consider the facts in these cases in the lower Federal courts, and the charges to the juries therein, except for the fact that recently the Supreme Court has had occasion to pass upon the constitutionality of very similar measures enacted by Congress while the United States was at war with Germany.

§ 485. Espionage Act of 1917.

By the so-called Espionage Act of June 15, 1917,[9] Congress, by Section 3 of Title I provided that: "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than 20 years, or both."

By Section 4 of this Title, the conspiring of two or more persons to violate the foregoing provisions was made punishable.

§ 486. Sedition Act of 1918.

It will be observed that Sections 3 and 4 of the Sedition Act related to oral, written or printed utterances in so far as they might play a part in the commission of the offence specified by them, and it would appear from the reports of the Attorney General of the United States that they were effective means for preventing organized disloyal acts or propaganda, but that they did not operate effectively against isolated or casual disloyal utterances or publications.[10] Additional legislation was therefore asked for, and this demand led to the passage of the so-called Sedition Act of May 16, 1918.[11]

It is to be observed of the Espionage and Sedition Acts of 1917 that, though not limited as to the time they are to remain in force, their provisions are made applicable only when the United States is at war. They are, therefore, war measures, and their constitutionality may be defended as such in so far as that species of Federal "Police Power" which is known as the "War Power," is able to cover them. This War Power is elsewhere discussed. It is sufficient here to say that, extensive as that power constitutionally is to meet the exigencies of war, it is not of a character that warrants its being treated as efficient to annul other express provisions of the Constitution. In other words the Espionage and Sedition Acts of 1917, though war measures, must be held invalid if, and in so far as, they violate the prohibition of the First Amendment with reference to freedom of speech and press, or, indeed, any other provision of the Constitution.

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[9] 40 Stat. at L. 217, 219.

[10] Report for 1918, p. 18.

[11] 40 Stat. at L. 553.

Of these acts it is further to be observed that the utterances or publications declared punishable, must have been uttered or published with the intent to cause the results enumerated in the acts. The importance of this element of intent will appear in the cases about to be considered in which the scope and constitutionality of the acts have been passed upon.

It may also be added that the right to deport undesirable aliens was also effectively used by the United States Government after it entered the World War in order to stamp out disloyal movements and doctrines in the United States.

§ 487. Sedition and Espionage Acts Upheld and Construed.

In March, 1919, the Supreme Court decided four cases in which the Espionage and Sedition Acts were upheld by a unanimous bench.[12]

In the Schenck and Baer cases, affirming convictions which had been obtained in the trial courts, the Supreme Court, with regard to the application of the First Amendment to the Espionage and Sedition Acts, said that it might be that the prohibition of that amendment with regard to freedom of speech and press is not confined to previous restraints, although to prevent them might have been, as declared in Patterson v. Colorado [12a] its main purpose; but that, however that might be, the protection of that Amendment would not cover the acts charged against the defendants in the instant cases. The court pointed out that the character of every act must depend upon the circumstances under which it is done; that, for instance, the right to free speech does not justify a man in falsely shouting fire in a theatre and causing a panic, or protect him against an injunction against using words which may have all the effect of force. "The question in every case," said the court in the

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[12] Schenck v. United States (249 U. S. 47); Baer v. United States (249 U. S. 47); Frohwerk v. United States (249 U. S. 204); and Debs v. United States (249 U. S. 211).

[12a] 205 U. S. 454.

Schenck case, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In the Schenck and Debs cases the accused were found to have directly counselled resistance to measures which the United States was taking for the prosecution of the war. In the case of Abram *et al.* v. United States,[13] in which the convictions were affirmed by the Supreme Court, a strong dissenting opinion by Justice Holmes (concurred in by Justice Brandeis) was filed in which it was urged that "it is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned," and this situation, said the dissenting Justices, had not existed in the instant case.[14]

In United States v. Schwimmer,[15] was affirmed the decree of the District Court refusing naturalization to an alien who declared her unwillingness, because of conscientious scruples, to take up arms in defence of the United States, and who also disclosed a disposition to persuade others to a like refusal. This, it was held, brought the applicant within the provisions of the Naturalization Act 1906 [16] which declares that an applicant for American citizenship must declare on oath his or her readiness to support and defend the Constitution and laws of the United States against all enemies, and be attached to the principles of the Constitution of the United States. Justices Holmes and Brandeis, dissenting, decried this as an unwarranted view in the light of the evidence as to the character and general beliefs of the applicant. In effect, these dissenting Justices held that, in substance, there was, by the holding of the court, an undue penalizing of the applicant because of her beliefs.

In Gilbert v. Minnesota [17] it was held that a State of the Union has such an interest in the successful conduct of a war by the United States that it is authorized to enact a law making it a crime to interfere with or discourage enlistment in the military or naval service of the United States; and the statute in this case was upheld upon the same grounds as had been upheld in the Federal Espionage and Sedition Acts.[18]

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[13] 250 U. S. 616.

[14] For other cases construing and applying the Espionage and Sedition Acts, see Pierce v. United States (252 U. S. 239); Schaefer v. United States (251 U. S. 466).

[15] 279 U. S. 644.

[16] 34 Stat. at L. 597.

[17] 254 U. S. 325.

[18] Justice Holmes concurred in the result; Chief Justice Taft dissented upon the ground that the subject-matter was within the exclusive jurisdiction of Congress, when exerted, and that Congress, by its legislation, had covered the entire field; Justice Brandeis dissented upon the ground that the State law in question was an

In Gitlow v. People of the State of New York [19] the accused had been indicted for the statutory crime of criminal anarchy as defined in the New York Penal Law,[20] originally enacted in 1902, and the constitutionality of the statute as construed and applied was questioned upon the ground that it was in violation of the liberty of expression guaranteed by the due process clause of the Fourteenth Amendment. This contention was declared by the Supreme Court to be without merit.

§ 488. Summary.

So far as the effect of the foregoing adjudications may be summed up, the result may be said to be as follows:

In 1799 Lord Kenyon, in his opinion in Rex v. Cuthell [21] said that the liberty of the press is neither more nor less than that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable. This is a correct statement of the situation in the United States, as well as in England, with reference to libels of individuals. The cases which have been discussed show that there may exist in the United States the offence of sedition or seditious libel which, by legislative definition, may include all false utterances or published statements injurious to the established government or the efficiency of its operations, and all utterances or publications, the intent of which, as deducible from the effect reasonably to be expected from them, is to advise or excite action which will disturb the security of the existing government, or which will place obstacles in the way of the efficient exercise of its legal powers. As in the case of the libelling of private individuals, the question whether the utterances or publications which are involved have such a seditious character, as thus defined, is one which the juries have the right to determine; and, as the law at present stands, they are not, as a matter of construction of the Espionage and Sedition Acts, or of constitutional necessity, obliged to limit their verdicts of conviction to those cases in which they find that there has been a present danger of the immediate evil sought to be guarded against by the statutes, or a direct intent upon the part of the accused to produce that evil,—that is, that that has been the proximate motive of the specific act or acts charged against him.

As has been already pointed out, the Espionage and Sedition Acts

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interference with Federal functions and the right of a citizen of the United States to discuss them. He suggested also that it was difficult to square the law with that liberty which is guaranteed to the citizen by the Fourteenth Amendment.

[19] 268 U. S. 652.

[20] Sections 160, 161.

[21] 27 St. Tr. 642.

provide by their own terms that they shall operate only when the United States is engaged in a war. However, the constitutionality of these acts does not depend upon the so-called "War Powers" of the Federal Government. They, or similar legislation, may constitutionally be enforced in times of peace. Whether the constitutional power of the government thus to punish false and politically injurious statements of fact, or seditious doctrines, that is, expressions of opinions that amount to seditious advice or to incitements to sedition, will or will not be oppressively used, must depend upon the juries before which the accused are tried. The courts must be relied upon to prevent the legislatures from exceeding constitutional bounds when defining what shall constitute a crime.

The foregoing statement of the present doctrine of the constitutional right to freedom of speech and press is in substantial agreement with that of Professor E. S. Corwin as expressed in his article "Freedom of Speech and Press Under the First Amendment" in the *Yale Law Journal* for November, 1920. Professor Corwin, concluding that article, says: "To sum up, the following propositions seem to be established with respect to constitutional freedom of speech and press: first, Congress is not limited to forbidding words which are of a nature 'to create a clear and present danger' to national interests, but it may forbid words which are intended to endanger those interests, if, in the exercise of a fair legislative discretion, it finds it 'necessary and proper' to do so; second, the intent of the accused in uttering the alleged forbidden words may be presumed from the reasonable consequences of such words, though the presumption is a rebuttable one; third, the court will not scrutinize on appeal the findings of juries in this class of cases more strictly than in other penal cases. In short, the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, which, so far as there is evidence to show, is just where the framers of the Constitution intended it to be." [22]

It is clear that no constitutional objection can be raised to the penalizing of any acts—including words spoken, written, printed, or published—which tend and are intended by those uttering, writing, printing or publishing them, to interfere with the efficient execution by the Federal Government of its lawful powers. This doctrine clearly covers all the prohibitions of the Espionage and Sedition Acts with possibly the exception of those which relate to "disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the

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[22] *Cf.* Cooley, *Constitutional Limitations,* 7th ed. 602.

Army or Navy of the United States," or to utterances or publications which tend and are intended to bring the Constitution, the form of government, the military or naval forces or their uniforms, or the flag of the United States "into contempt, scorn, contumely, or disrepute." It is possible that, in times of peace, the courts might feel themselves justified in holding that these just cited prohibitions extend beyond a reasonable solicitude for the security and operative efficiency of the Federal Government, and that, therefore, as tested by the First Amendment, are not constitutionally justified, just as, in the case of attempts to exercise an unreasonable control of persons and property under the guise of the police power by the States, the due process provision of the Fourteenth Amendment is declared to be violated. But, in time of war, there would seem to be a reasonable and therefore constitutional basis for these provisions, for, as is now conceded, and as was exemplified in the Great War, the general *morale* of a people, that is, of the non-combatants as well as of those in the field, is an important element in the waging of war, and, in a great and even balanced struggle, must, at all costs, be maintained.

§ 489. Contempt of Court and Freedom of Speech and Press.

It is easily apparent that the power of courts to punish, as contempt of themselves, spoken or printed words, can be so arbitrarily used as to lead, in substance at least, to an impairment of a reasonable exercise by the individual to voice orally or in print his opinions either of the courts or of matters pending before them. It is, however, to be recognized that, under any law, so extensive is the power of the courts to punish what they may deem to be contempts of themselves that it is difficult if not impossible to prevent occasional abuses of that power, although, of course, in extreme cases, impeachment and removal from office of the offending judges is possible.

Elsewhere in this treatise, the constitutional extent of the legislative power to limit the power of the courts to punish for contempts is considered, and it will be sufficient here to refer to two fairly recent cases which illustrate the manner in which this contempt power may be used to punish spoken or printed words.

In Patterson v. Colorado,[23] Patterson had been proceeded against for contempt, found guilty, and fined for publishing a cartoon which the Supreme Court of Colorado deemed to reflect upon itself, and to embarrass it in the conduct of cases still pending before it. Upon error to the Supreme Court of the United States, upon the ground that there had been a denial of due process of law in violation of the guarantee of the Fourteenth Amendment, the Supreme Court declared that what constitutes contempt, as well as the time during which it may be committed, is a matter of local law. Furthermore, that the truth of the matter spoken or published and alleged to be a contempt, cannot be set up as a defence. The court said that this would be so even if it were assumed that the prohibitions of the Fourteenth Amendment could be held to cover the matter of denials of freedom of speech and the press.[24]

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[23] 205 U. S. 454.

§ 490. Free Speech and Immigration Requirements.

In United States v. Williams[25] the provision of the Immigration Act of March 3, 1903, for the exclusion of aliens holding anarchistic beliefs was indeed questioned on the ground that freedom of speech and press was infringed, but the court dismissed the point with the observation that while it is true that, if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled therefrom, he is cut off from speaking or publishing in this country, yet the right freely to speak or publish is not infringed, for the one claiming the right "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law." The question thus became simply one of the right to exclude. As to this the court had no doubt in the premises of the power of Congress.

§ 491. Free Speech and the Mails.

In *Ex parte* Jackson[26] the court, after holding that sealed matter in the mails may not be opened and examined, except upon a proper search warrant, went on to observe that, as to printed unsealed matter, its transportation in the mails may not be so interfered with as to violate the freedom of the press, because unfettered circulation of printed matter is as essential to the freedom of the press as is the liberty of printing. Therefore, it was declared, if printed matter be excluded from the mails, its transportation in other ways may not be forbidden by Congress.[27]

The main purpose of the constitutional provisions of the First Amendment has been declared to be "to prevent all such previous restraints upon publications as has been practised by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." [28] In the case in which this doctrine was declared, the court held unfounded the claim of a right under the First Amendment to prove the truth of statements contained in certain publications which had by the lower court been held to constitute a contempt of the court.

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[24] See also Toledo Newspaper Co. v. United States (247 U. S. 402).

[25] 194 U. S. 279.

[26] 96 U. S. 727. See also *Ex parte* Rapier (143 U. S. 110).

[27] "Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

It would thus appear that the prohibition of the First Amendment relative to the abridgment of freedom of speech or press not only leaves to the Federal courts the authority to grant relief to persons libelled or slandered, and to punish for contempt the publication or utterance of statements reflecting upon its own dignity or calculated to interfere with the proper and efficient administration of justice and the execution of its writs, but that it preserves, or at least does not restrict, the power of Congress to declare criminal and provide punishment for the publication or open advocation of doctrines or practices calculated to destroy or interfere with the exercise of its constitutional powers.

§ 492. Moving Pictures—Censorship of.

In Mutual Film Corporation v. Industrial Commission of Ohio [29] was raised the relationship of the censorship of motion picture films to freedom of speech and the press—as guaranteed by a provision of the State Constitution. Such a censorship exercised by a Board of Censorship to which by statute had been delegated the power to prohibit the exhibition of films not, in its judgment, of a moral, educational, or amusing and harmless character, was sustained as a legitimate exercise of the State's police power. The Supreme Court recognized that films might be used as mediums of thought, but so, said the court, may other exhibitions such as theatres, circuses, etc., which, it was agreed, might be subjected to police regulation and censorship.[30]

§ 493. The Right Peaceably to Assemble and Petition.

By the First Amendment the right of the people is guaranteed "peaceably to assemble, and to petition the government for redress of grievances." Almost the only discussion of this provision by the Supreme Court is that contained in the opinion in United States v. Cruikshank [31] in which it is said: "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government."

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[28] Patterson v. Colorado (205 U. S. 454); citing Com. v. Blanding (3 Pick, 304); Respublica v. Oswald (1 Dall. 319). Justice Harlan dissenting, said: "I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech wherever it thinks that the public welfare requires that to be done."

[29] 236 U. S. 230.

[30] See also Mutual Film Corp. v. Hodges (236 U. S. 248).

[31] 92 U. S. 542.

The court went on to observe, however, that: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States."

§ 494. The Right to Bear Arms.

By the Second Amendment it is provided that "a well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

In Presser v. Illinois[32] was questioned the constitutionality of a section of the military code of a State forbidding bodied of men to associate together or parade or drill with arms in cities and towns unless authorized by law. The court, however, held that, so far as the Second Amendment to the Federal Constitution was concerned, there was no objection to this provision for the reason that the amendment, like the other of the first eight amendments, applies only to the Federal Government. But it was, however, also objected that the statute was inconsistent with, or at least that it attempted to cover ground already covered by, congressional legislation with reference to the organization and control of the Federal militia. As to this the court said: "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But . . . we think it clear that the sections under consideration do not have this effect."

§ 495. The Quartering of Troops.

The provision of the Third Amendment that "no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law," requires little explanation, and has received practically none by the Supreme Court.

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[32] 116 U. S. 252.

CHAPTER LVII

SLAVERY AND INVOLUNTARY SERVITUDE

§ 496. Slavery and Involuntary Servitude.

The prohibition of the Thirteenth Amendment is absolute upon both the States and Federal Government that "neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

By Section 2 of the amendment Congress is given the power to enforce this prohibition by appropriate legislation.

§ 497. Enforcement Clause of the Thirteenth Amendment.

It is to be observed that, whereas the Fourteenth Amendment has for its aim the protection of citizens against action on the part of the States, and that, therefore, the legislative power of Congress under its enforcement clause is limited to the prevention or punishment of the prohibited acts on the part of the States, the Thirteenth Amendment absolutely prohibits the existence of the institution or fact of slavery or involuntary servitude, and the enforcement clause, therefore, gives to the General Government the power to punish the individual or individuals, whether private persons or State officials, who hold, or attempt to hold, any one in slavery or involuntary servitude.

Pursuant to the power thus given Congress has, by various acts, declared criminal and provided punishment for persons violating the constitutional provision.[1]

In Clyatt v. United States,[2] upholding the constitutionality of these measures, the court observed that the amendment denounces a status or condition irrespective of the manner in which or authority by which created, and that though self-executing without ancillary legislation so far as its laws are applicable in existing circumstances, "legislation may be necessary and proper to meet all the various cases and circumstances affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character."[3] In this respect it was especially pointed out that the Thirteenth differs from the Fourteenth Amendment.

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[1] See Chapter 10 of act of March 4, 1909, codifying, revising, and amending the Federal laws of the United States. 35 Stat. at L. 1138.

[2] 197 U. S. 207.

This legislative power of Congress does not, however, extend to the prohibition and punishment of acts which do not in themselves amount to a holding of one in slavery or involuntary servitude, but are acts which infringe the freedom of another. Thus, in Hodges v. United States,[4] was sustained a demurrer to an indictment in a Federal court, on the ground of lack of jurisdiction, which indictment charged the accused with compelling certain negro citizens, by intimidation, and force, to desist from performing their contracts of employment.[5]

To the argument that one of the *indicia* of slavery is the lack of power to make or perform contracts, and that by the acts of the accused this disability had been brought about and the negroes thus *pro tanto* reduced to a condition of slavery, the court replied that practically every wrong done to another has this result, and to concede the claim of counsel would be to place the punishment of all acts of personal wrong or duress within the power of the Federal Government.

§ 498. Involuntary Servitude: Peonage.

The Thirteenth Amendment had, of course, for its chief purpose, the abolition of negro slavery. But this was not the sole purpose. Its terms were purposely made broad enough to exclude not only slavery of any person, whatever his race or color, but his involuntary servitude save as a punishment for crime.[6] It has thus become necessary for the courts to pass upon the constitutionality of various forms of compulsory service which, while not amounting to slavery, have been alleged to constitute involuntary servitude or peonage.[7]

In the Slaughter House cases[8] it was alleged that the grant of exclusive slaughtering rights to a corporation, and the consequent compulsion upon individuals to resort to that corporation for the slaughtering of live stock, created a state of involuntary servitude. After a review of the circumstances leading up to the adoption of the *post bellum* amendments the court, while admitting that "the word 'servitude' is of larger meaning than slavery as the latter is popularly understood in this country," declined to extend that meaning so as to include the obligation of the citizen to conform to a requirement of law which, as the court went on to hold, is a legitimate exercise of the States' police powers.

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[3] This language was substantially quoted from the opinion in the Civil Rights cases (109 U. S. 3).

[4] 203 U. S. 1.

[5] The indictments were brought under §§ 1977 and 5508 of the Revised Statutes.

[6] "Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican of Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent." Slaughter House Cases (16 Wall. 36).

[7] The holding or returning of persons to peonage has been declared criminal by act of Congress. §§ 269, 270, act of March 4, 1909.

[8] 16 Wall. 36.

In the Civil Rights Cases [9] it was held that the denial to persons of admission to the accommodations and privileges of an inn, a public conveyance or a theater, does not subject him to involuntary servitude "or tend to fasten upon him any badge of slavery," and that, therefore, Congress had no power under the enforcement clause of the Thirteenth Amendment to provide for the punishment of individuals convicted of this denial.

In Robertson v. Baldwin [10] the court upheld certain provisions of the Revised Statutes providing for the apprehension of deserting seamen, and the compulsory fulfilment by them of their contracts, as not in violation of the Thirteenth Amendment.

§ 499. Contracts for Personal Services: Enforcement of.

The Thirteenth Amendment renders unenforcible contracts for personal services, suits for damages in cases of breaches of such contracts being the only remedy left the ones to whom such services have been promised. A more doubtful question is as to the power of the States or of the United States to provide punishment for the breach of contracts for personal services. Various cases have been decided in the State and Federal courts with reference to this point. In general it may be said that the doctrine is established that statutes making criminal the mere breach of contract are void as in violation of the amendment; but that where such breach involves deliberate fraud, the law will be sustained, even though the effort may be, by the threat of the punishment for the fraud, to compel the performance of the promised services.

However, in Bailey v. Alabama [11] it was held that the Thirteenth Amendment was violated by a State law which declared that the breach without just cause of a contract for personal services should be deemed *prima facie* evidence that the accused had entered into it with the intention to injure or defraud his employer, and that, upon conviction he might be criminally punished therefor. The objectionable statute, the court declared sought to create a status of peonage which is a form of involuntary servitude.

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[9] 109 U. S. 3. See also Plessy v. Ferguson (163 U. S. 537).

[10] 165 U. S. 275.

[11] 219 U. S. 219.

In United States v. Reynolds [12] the court held that a condition of peonage resulted from the operation of a provision of the code of the State of Alabama under which a person fined under conviction for a misdemeanor might confess judgment with a surety in the amount of the fine and costs, and agree with the surety, in consideration of the payment by him of the judgment, to work for him under terms approved by the court, which terms might, in fact, be more onerous than if the convict had been sentenced to imprisonment at hard labor, and the performance of his agreed-upon service compelled by fear of rearrests and new fines which, in turn he might agree with sureties to work out. "Compulsion of such service by the constant fear of imprisonment under the criminal laws," said the court, "renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done."

§ 500. Personal Service upon Highways.

As is well known, it has been a traditional policy in America since before the adoption of the Constitution for the public authorities to require its able-bodied citizens of certain ages to render a number of days' service annually in the construction or repair of highways. This requirement the Supreme Court held in Butler v. Perry [13] does not impose involuntary servitude.

The statute in this case provided that, in lieu of personal labor, a substitute might be provided, or $3 paid to the road overseer. Thus personal service could be avoided. No point was, however, made of this feature of the law in the court's decision, which was squarely to the effect that such personal service may be required by a State of its citizens.

§ 501. Injunctions Restraining Laborers from Abandoning Their Employments.

Generally speaking, courts hold themselves restrained by the Thirteenth Amendment from issuing writs ordering persons to continue the rendition of personal services, or restraining them from ceasing to render such services. However, equity courts have felt themselves justified in issuing orders restraining servants from quitting work at a time that will endanger human life or limb, or, indeed, will cause unnecessary or irremediable pecuniary loss to the employer. Thus, for example, the train hands of a railway company might be forbidden to leave their employment before bringing their train to its destination, or at least to some station where additional hands might be obtained to operate the train.[14]

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[12] 235 U. S. 133.

[13] 240 U. S. 328.

[14] Freund, *Police Power*, §§ 333, 452. See especially Toledo, etc., R. Co. v. Penn. Co. (54 Fed. Rep. 730); Arthur v. Oakes (63 Fed. Rep. 310).

CHAPTER LVIII

PROHIBITIONS LAID UPON THE STATES

§ 502. Prohibitions upon the States.

The prohibitions upon State action imposed by the Federal Constitution are of two kinds: (1) those which arise from the fact that their exercise would be inconsistent with the powers possessed by the Federal Government; and (2) those specifically laid down in the Federal Constitution. Those limitations upon the powers of the States incidental to the general nature of the Federal Government and to the powers possessed by it are treated in their appropriate places in this treatise. In this chapter there will be considered the express limitations upon the States as enumerated in the Constitution. These are found in Section 10 of Article I, and in the Thirteenth, Fourteenth, Fifteenth, Eighteenth and Nineteenth Amendments.[1]

Various other clauses of the Constitution, as for example Sections 1, 2 and 4 of Article IV and Article VI, by imposing specific obligations upon the States may be said to create corresponding limitations, but these are elsewhere considered in this work.

That the prohibitions of the first eight amendments, like those contained in Section 9 of Article I of the Constitution relate exclusively to the Federal Government, and place no restrictions upon State action has been uniformly held since the first declaration of the principle in Barron v. Baltimore.[2] That the adoption of the Fourteenth Amendment did not operate to alter this doctrine has been pointed out in this treatise.[3] The prohibitions laid upon the States with reference to slavery and involuntary servitude, have been considered in the preceding chapter. Those relating to due process of law and the equal protection of the laws, will be considered in later chapters.

§ 503. Bills of Credit.

The first clause of Section 10 of Article I of the Constitution declares that "no State shall . . . emit bills of credit; [or] make anything but gold and silver coin a tender in payment of debts."

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[1] Certain of these limitations are, for topical reasons, considered elsewhere.

[2] 7 Pet. 243; 8 L. ed. 672. In Twitchell v. Penn. (7 Wall. 321), the court said: "The scope and application of these amendments are no longer subject to discussion here." This statement was quoted in United States v. Cruikshank (92 U. S. 542), the court adding: "They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States."

[3] Chapter XII.

In Craig v. Missouri,[4] decided in 1830, the Supreme Court was for the first time called upon to determine squarely what constitutes a "bill of credit" within the meaning of the constitutional prohibition. In this case was questioned the power of the State to issue interest-bearing certificates, not declared legal tender, but receivable at the treasury or any of the loan offices of the States in discharge of taxes or payment of debts due to the State. Certain property of the State was pledged to their redemption, and the governor was authorized to negotiate a loan of silver or gold for the same purpose. These certificates, it was provided, might be loaned to citizens of the States upon real estate or personal security. These certificates, the Supreme Court held to be bills of credit, and, as such, illegally emitted. In his opinion Marshall said: "To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day."

Having adverted to the characteristics of the certificates in question, their denominations—from ten dollars to fifty cents—their receivability for taxes, etc., as indicating conclusively that they were fitted and intended for circulation as currency, the court next overruled the contention that they were not to be deemed bills of credit in the constitutional sense because not made legal tender. "The Constitution itself," it was declared, "furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description." [5]

In the case of Briscoe v. Bank of Kentucky [6] was questioned the power of a State to charter a bank, of which the State was the sole stockholder, with the power of issuing notes payable to bearer on demand designed to circulate as money. The case was first argued just before the death of Chief Justice Marshall, and the issue of these notes by the bank was held to be, in effect, the issuance of bills of credit by the State itself. A rehearing being granted, however, and the case coming on for argument before the court presided over by Taney, the previous decision was reversed, and the notes held to be constitutionally issued. The fact that the State was the exclusive stockholder of the bank was held immaterial. Quoting from Bank of United States v. Planters' Bank [7] the principle was declared that a State by becoming a partner in or the owner of stock of a trading company "divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself."[8]

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[4] 4 Pet. 410.

[5] It is perhaps worthy of note that this case represents the only instance in which State issues have been held to be bills of credit.

[6] 11 Pet. 257.

[7] 9 Wh. 904.

In Darrington v. Bank of Alabama[9] the doctrine of the Briscoe case was reaffirmed. In this case the State was not only the sole stockholder of the bank but had pledged its faith for the ultimate redemption of its notes. This, however, it was held, did not operate to transform the notes into State-emitted bills of credit for the reason that the bank had corporate property of its own which was primarily liable and sufficient for the payment of the notes. It was admitted that some reliance might have been placed upon the State's guaranty, but this liability, the court declared, was "altogether different from that of a State on a bill of credit. It was remote and contingent, and it could have been nothing more than a formal responsibility if the bank had been properly conducted. No one received a bill of this bank with the expectation of its being paid by the State."

In the Virginia coupon case of Poindexter v. Greenhow[10] the court held that interest coupons cut from bonds issued by the State and made receivable by the State in payment of taxes due it, were not bills of credit. Though promises to pay money, and the credit of the State pledged therefor, and receivable by the State for taxes, the coupons were not issued or emitted as a circulating medium or paper currency.

In Houston, etc., Ry. Co. v. Texas[11] a warrant by State authorities in payment of an appropriation made by the legislature for a debt due by the State and payable upon presentation if there should be funds in the treasury, was held not to be a bill of credit within the meaning of the constitutional prohibition.

§ 504. Ex Post Facto Legislation.

By Section 10, Clause 1 of Article I, the States are forbidden to pass any *ex post facto* law The same prohibition is laid upon the Federal legislature by the third clause of Section 9, and the force of this prohibition has been sufficiently considered in the preceding chapter.

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[8] A strong dissenting opinion was filed by Justice Story.

[9] 13 How. 12.

[10] 114 U. S. 270.

[11] 177 U. S. 66.

CHAPTER LIX

THE OBLIGATION OF CONTRACTS

By Section 10 of Article I of the Constitution it is provided that "no State shall . . . pass any . . . law impairing the obligation of contracts." This provision, the intent of which would seem to be sufficiently plain, has given rise to a multitude of decisions in the courts. In the present chapter no attempt will be made to consider all of these decisions, but the effort will be made to state the general principles deducible from them.

§ 505. Changes in Means or Manner of Enforcement of Contracts.

The obligation of a contract is not impaired by a law which changes the legal or equitable means for its enforcement existing at the time it was entered into, provided an adequate, though perhaps not so convenient, a remedy is retained or substituted therefor.

The foundation for this ruling is the doctrine that no person has a vested right to have the law remain unaltered.[1]

Earlier than this, in Bronson v. Kinzie[2] the court had said: "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."[3]

It is apparent, then, that it lies within the province of the court in each individual case to determine whether the legislative alteration of a remedial right with reference to a contract earlier entered into is of such a drastic character as to cause it to diminish the substantive rights under that contract, and thus, in effect, to impair its obligation. It is, therefore, impossible to lay down any rule in the premises, and the commentator must content himself with stating some of the more important specific adjudications that have been made.

A State statute which substantially withdraws a debtor's property from execution impairs the obligation of a contract in that the creditor is deprived, *pro tanto*, of his right to satisfy his claims thereunder. Thus a

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[1] Oshkosh Waterworks Co. v. Oshkosh (187 U. S. 437).

[2] 1 How. 311, 316.

[3] Citing Green v. Biddle (8 Wh. 1).

State law which exempted homesteads from liability was held void as applied to contracts already entered into.[4] The same invalidity was ascribed to State laws staying execution on judgments.[5] But a statute shortening the period of limitation for bringing an action, but not reducing it to an unreasonably short period, was sustained.[6] So also was a statute which abolished imprisonment for debt but left other remedies which the court deemed adequate for the collection of moneys due under contracts.[7] In National Surety Co. v. Architectural Decorating Co.[8] was sustained a law which, with reference to bonds of a public contractor, required a notice of claim to be given within ninety days "after the completion of the contract and the acceptance of the building by the proper public authorities," instead of one within ninety days "after performing the last item of work, or furnishing the last item of skill, tools, machinery, or materials," and which provided that the action be begun within one year "after the service of such notice," instead of "after the cause of action accrues."

It scarcely needs be said that a law does not come within the constitutional prohibition which increases rather than diminishes the remedies for enforcing a contract. As the court said in Bernheimer v. Converse,[9] "There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made." [10]

Thus, generally, it may be said that laws which operate to remedy or cure technical defects so as to give validity to otherwise invalid contracts are constitutional, their effect being to confirm rather than to impair the obligation of contracts.[11]

Implied contracts in fact, as distinguished from *quasi* or constructive contracts, are as fully protected by the constitutional guarantee as are express contracts.[12]

Executory and executed contracts are also protected.[13]

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[4] Gunn v. Barry (15 Wall. 610).

[5] Dictum in Edwards v. Kearzey (96 U. S. 595).

[6] Wheeler v. Jackson (137 U. S. 245).

[7] Beers v. Haughton (9 Pet. 329).

[8] 226 U. S. 276.

[9] 206 U. S. 516.

[10] The State law sustained in this case was one which enabled a receiver of a corporation to maintain an action for the benefit of creditors outside of the jurisdiction of the court appointing him—a remedy that was not available at the time the contract liabilities were incurred.

[11] Watson v. Mercer (8 Pet. 88).

[12] In Fisk v. Jefferson Police Jury (116 U. S. 135) this is spoken of as "well settled."

[13] Fletcher v. Peck (6 Cr. 87); Green v. Biddle (8 Wh. 1); Farrington v. Tennessee (95 U. S. 679).

§ 506. Contracts to which a State Is a Party Are Protected.

The contracts, the obligation of which is secured from impairment by the States, include agreements between the States and between a State and an individual or individuals, as well as those between individuals. In other words, the State when contracting does so upon the same terms as a private individual or corporation, and may not plead its sovereignty as justifying subsequent action upon its part impairing the contractual obligations which it has assumed. Its non-amenability to suit may, however, enable a State to avoid the performance of an agreement which it has undertaken to perform. This branch of the subject is more fully discussed in the chapter of this treatise dealing with the Suability of the State.[14]

Election or appointment to a public office does not create a contract between the State and the one so appointed.[15]

Marriage, though in some respects properly describable as a contract, is not one the obligation of which is protected from impairment by the State.

In the Dartmouth College case[16] Chief Justice Marshall declared: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the right of the legislature to legislate on the subject of divorce." In Maynard v. Hill[17] this doctrine was judicially affirmed.

A license granted by a State, or by one of its political subdivisions, is not a contract within the meaning of the prohibition. It is nothing more than the grant of a privilege which, so far as the Federal prohibition regarding the impairment of the obligation of contracts is concerned, may be revoked at any time at the will of the grantor. This principle is so well settled that a citation of authorities is scarcely needed. The only difficulty lies in determining in specific cases whether the grant of authority by the State is in the nature of a license or of a franchise, which is to be construed as a contract. However, the presumption is always against the existence of a contract. "A contract binding the State is only created by clear language and not to be extended by implication beyond the terms of the statute."[18]

Generally speaking, the right of a foreign corporation to do business within a State is in the nature of a license which that State may revoke or modify at discretion. Where, however, the foreign corporation, relying upon an existing law to the effect that certain charges will not, for a certain period at least, be imposed upon it, has entered the State for the transaction of business there, a contract to that effect is held to exist between it and the State, the obligation of which the latter may not impair.[19]

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[14] Chapter LXVII.

[15] See especially the case of Butler v. Pennsylvania (10 How. 402).

[16] 4 Wh. 518.

[17] 125 U. S. 190.

[18] Williams v. Wingo (177 U. S. 601); Fanning v. Gregoire (16 How. 524); Larson v. South Dakota (278 U. S. 429, 437).

§ 507. Charters of Public Corporations.

The charters of public corporations, investing them with subordinate legislative and other governmental powers, are not contracts within the meaning of the obligation clause, and, so far as the Federal Constitution is concerned, the State legislature has, with reference to them, unlimited powers of amendment or repeal.[20]

Where, however, municipalities or other subordinate political corporations have, in the exercise of their charter powers, entered into contracts, those contracts are protected from subsequent impairment by State law.[21] Any law which withdraws or limits the remedies for the enforcement of such contracts is void.[22]

Generally speaking, also, franchises granted by municipal corporations, if authorized by their charters, are contracts which, under the authority of the Dartmouth College case, presently to be considered, are protected against impairment.

So also, a State law limiting the powers of taxation of a municipal corporation, whereby its ability to pay its debts is materially lessened, is void as to debts created prior thereto, the creditors relying upon the taxing powers of the corporation to provide the funds for the payment of their claims.[23]

In Louisiana v. New Orleans [24] the court declared it to be settled law that "where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied; and that it is an impairment of an obligation of the contract to destroy or lessen the means by which it can be enforced."

So also, generally, it is held to be an impairment of the obligation of contracts entered into by municipal corporations to deprive them by subsequent State legislation of any authority whatsoever, whereby they may be rendered less able to perform their agreements, or whereby the enforcement of their claims by creditors is rendered more difficult or less certain. "That obligation is impaired, in the sense of the Constitution, when the means by which a contract, at the time of its execution, could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means." [25]

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[19] Am. Smelting Co. v. Colorado (204 U. S. 103).

[20] Laramie Co. v. Albany Co. (92 U. S. 307). See also New Orleans v. New Orleans Waterworks Co. (142 U. S. 79).

[21] New Orleans v. New Orleans Waterworks Co. (142 U. S. 79).

[22] Mobile v. Watson (116 U. S. 289); Louisiana v. Pilsbury (105 U. S. 278).

[23] United States v. Port of Mobile (12 Fed. Rep. 768); Seibert v. Lewis (122 U. S. 284); Sawyer v. Concordia (12 Fed. Rep. 754); United States *ex rel.* Wolff v. New Orleans (103 U. S. 358); Ralls Co. v. United States (105 U. S. 733).

[24] 215 U. S. 170, 175.

"A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States." [26]

§ 508. Charters of Private Corporations Are Contracts: The Dartmouth College Case.

In 1819 in the Dartmouth College case [27] a charter of a private corporation was held to be a contract between the State granting it and the corporation, which the former might not impair by subsequent legislation. Prior to this decision, it had been held in Fletcher v. Peck,[28] decided in 1810, that the obligation clause applied to executed as well as to executory contracts, and to contracts entered into by the States as well as to those between private individuals. In New Jersey v. Wilson [29] it had also been held that a State might contract away its right of taxation as to certain specified persons and things, which contract could not be rescinded by a subsequent legislative act; and in Terrett v. Taylor [30] that the constitutional prohibition was applicable to contracts entered into by the States. In this last case a State was not permitted to divest title to certain lands, the title to which rested upon an earlier legislative grant.

This fundamental doctrine that the charter of a private corporation is a contract which, under the obligation clause, a State may not impair by legislation, though it has been much criticized, has never been departed from by the Supreme Court. In practical operation, however, its force has been much weakened not only by a very general practice upon the part of the States, when granting charters, to reserve the right to amend or revoke them,[31] but by later decisions of the courts with reference to the strictness with which the contractual elements of corporate charters are construed, and to the power of the States in the exercise of their police powers, their power of eminent domain, and their authority to control public service corporations, or corporate concerns affected with a public interest, to disregard even those charter rights which a strict construction shows to have been granted.

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[25] United States *ex rel.* Wolff v. New Orleans (103 U. S. 358).

[26] New Orleans Waterworks v. Louisiana Sugar Ref. Co. (125 U. S. 18). In St. Paul Gaslight Co. v. St. Paul (181 U. S. 142), this was declared to be "no longer open to question."

[27] Trustees of Dartmouth College v. Woodward (4 Wh. 518).

[28] 6 Cr. 87.

[29] 7 Cr. 164.

[30] 9 Cr. 43.

§ 509. Charter Grants Strictly Construed.

With reference to the strictness with which charter grants are to be construed the courts have laid down the doctrine that the State is to be held to have granted only such powers or immunities as are specifically or unequivocally stated, or as are necessarily and unavoidably implied therein. In Northwestern Fertilizing Co. v. Hyde Park [32] the court said: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim." [33]

§ 510. Regulation of Rates.

The right of public service corporations to fix their own charges or tolls is one which the legislature may grant, and, when granted, constitute a contract which the legislature may not subsequently impair.[34] It does not need to be said, however, that this agreement upon the part of the State not to exercise its regulative power is one that must be explicitly stated. A general grant to the corporation of the power to fix, or alter its charges or tolls as it may think proper, is not an abdication by the State of its power of control.[35] Nor does a grant to the corporation of a power to fix its own rates, provided they are not unreasonable, have this effect [36] nor does a grant of power to fix the charges, provided they be not in excess of a specified rate, prevent the State from later fixing a lower rate.[37] And, generally, the reservation by the State of a power to amend or revoke the charter, carries with it a power to regulate the charges that may be made.[38]

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[31] In some States the legislatures are without constitutional power to grant irrepealable or unamendable charters. This right of amendment or revocation, however, may not be so exercised as to deprive the corporation of property without due process of law.

[32] 97 U. S. 659.

[33] See Charles River Bridge Co. v. Warren Bridge (11 Pet. 420); St. Clair County Turnpike Co. v. Illinois (96 U. S. 63); Oregon R. & Nav. Co. v. Oregonian R. Co. (130 U. S. 1); Coosaw Mining Co. v. South Carolina (144 U. S. 550); Knoxville Water Co. v. Knoxville (200 U. S. 22); Rector of Christ Church v. Philadelphia Co. (24 How. 300); Tucker v. Ferguson (22 Wall. 527); R. R. Co. v. Board of Supervisors (93 U. S. 595); Wheeling and Belmont Bridge Co. v. Wheeling Bridge Co. (138 U. S. 287); C. M. & St. P. Ry. Co. v. Minn. (134 U. S. 418); Larson v. South Dakota (278 U. S. 429).

[34] Los Angeles v. Los Angeles City Water Co. (177 U. S. 558).

[35] Stone v. Ill. Cent. Ry. Co. (116 U. S. 347).

In the recent case of Railroad Commission v. Los Angeles R. Corp.[39] it was held that a State may authorize a municipal corporation by agreement to establish public service rates and thereby suspend for a term of years, not grossly excessive, the legislative power of the State to declare what shall be a just compensation for the services rendered by public utilities. Hence, it was held, that, where such an agreement between the city and the public utilities exists, the utility may not be required to furnish services for less than the agreed upon rates even though they may be unreasonably high. So, also, when there is such an agreement, the courts may not relieve the public utility from abiding by the agreed upon rates, even though they prove to be inadequate to the utility.

It would appear, then, that the courts recognize the power of the States and of the Federal Government to limit by means of charter provisions or other contracts the extent to which the rates of public utilities may be subsequently regulated by law, provided that these contract limitations are unequivocally set forth.

In Southern Iowa Electric Co. v. Chariton,[40] the court, after pointing out that, as a general proposition, the State cannot fix rates so low as to be confiscatory in their effect with regard to the public utility, said: "Where, however, the public service corporations and the governmental agencies dealing with them [i. e., municipalities] have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial." [41]

However, when the contract relied upon is between a municipal corporation and the public utility, there is always present the question whether the municipality has been given by the State the authority to enter into the contract. Thus, in the Southern Iowa Electric Co. case, as well as in that of San Antonio v. San Antonio Public Service Co.[42] decided at the same time, it was held that the municipalities concerned had not possessed the power so to contract with the public service corporations as to permit the enforcement by the municipality of confiscatory rates. Such a power, it was declared, could not be inferred from a general right granted by the States to the municipality to regulate the rates of the utilities concerned.[43]

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[36] Chicago, etc., Ry. Co. v. Minn. (134 U. S. 418).

[37] Georgia R. & Bkg. Co. v. Smith (128 U. S. 174).

[38] Peik v. Chicago, etc., R. R. Co. (94 U. S. 164). See also Railway Commission Cases (116 U. S. 307).

[39] 280 U. S. 145.

[40] 255 U. S. 539.

[41] Citing Freeport Water Co. v. Freeport (180 U. S. 587); Detroit v. Detroit City R. Co. (184 U. S. 368); Knoxville Water Co. v. Knoxville (189 U. S. 434); Cleveland v. Cleveland City R. Co. (194 U. S. 517); Home Tel. & Tel. Co. v. Los Angeles (211 U. S. 265); Minneapolis v. Minneapolis Street R. Co. (215 U. S. 417); Columbus R. Power & Light Co. v. Columbus (249 U. S. 399).

§ 511. The Police Power and the Obligation of Contracts.

Whatever may be the power of the States to tie their hands by express contracts with regard to the exercise by them of their taxing or rate-making powers, it is established that they cannot contract away their continuing right to exercise their police powers.

The extent of the power of the States in the exercise of their police powers to control the operations of domestic corporations as well as the strictness with which the charter grants are to be construed, is exhibited, in the case of the Northwestern Fertilizing Co. v. Hyde Park,[44] decided in 1878.

§ 512. Tax Exemptions.

Arguing from the fact that all charter contracts are presumed to be entered into with a knowledge and consent that they are, in their performance, subject to a legitimate exercise of the police power, the doctrine was early advanced that they are similarly subject to the State's taxing power; that, in other words, the power to tax is necessarily and inherently a sovereign power of the State and, therefore, may not be bartered away, or its exercise in any way estopped. The courts have, however, held, as has been already intimated, that this is not so.

In many cases, though not without hesitation and against minority protests, exemptions from taxation granted by the State in return for some conceived substantial *quid pro quo* have been held contracts that might not thereafter be impaired. Such exemptions are, however, construed, it need not be said, with extreme strictness.[45]

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[42] 255 U. S. 547.

[43] *Cf.* the article of Professor Burdick, "Regulating Franchise Rates" in 29 *Yale Law Journal*, 589.

[44] 97 U. S. 659. See also Stone v. Mississippi (101 U. S. 814); New Orleans Gas Light Co. v. Louisiana Light, etc., Co. (115 U. S. 650); Chicago & Alton R. Co. v. Tranbarger (238 U. S. 67).

[45] See Stone v. Mississippi (101 U. S. 814); Chicago Theological Seminary v. Illinois (188 U. S. 662); N. Y. *ex rel.* Met. R. Co. v. Tax Commissioners (199 U. S. 1); Wells v. Mayor of Savannah (181 U. S. 531); Tucker v. Ferguson (22 Wall. 527); Bank of

§ 513. Impairment of Contracts by Taxation.

When, however, the States and their political subdivisions have endeavored to use their taxing power as an indirect means of avoiding explicit contract obligations, the Supreme Court has not hesitated to interpose its veto. Indeed, the court has said that attempted taxation has been the mode most frequently employed for the impairment of contracts.

Thus, in 1871, the city of Charleston by ordinance directed the city treasurer to retain out of the interest due on city stock a tax assessed on all the real and personal property in the city. This ordinance the Supreme Court in Murray v. Charleston [46] held void as an impairment of the obligation of the contract of the city with its creditors.

§ 514. Instances of Incapacity of the States or Municipalities to Contract.

With reference, also, to various matters which, properly speaking, cannot be said to fall within the domain of the police power, the State legislatures have been held to be incompetent to contract. Thus in Newton v. Commissioner [47] it was declared, with reference to the location of a county seat, that one legislature could not bind its successors. So, also, in Illinois Central R. R. Co. v. Illinois [48] the Supreme Court held that the people of the State were, as a continuing whole, interested in the navigable waters of the State and in the lands under them, and that, therefore, the title to them was held in trust by the State and could not be ceded away.

§ 515. Eminent Domain and the Obligation of Contracts.

That property of incorporated companies, like other species of property, are subject to the State's power of eminent domain, is not questioned. In Long Island Water Supply Co. v. Brooklyn [49] it is declared: "A contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just compensation. . . . The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to the public uses."

§ 516. Construction of Contracts.

Under the obligation clause no general power is given to the Federal Supreme Court to review the decisions of State courts as to the proper

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Commerce v. Tennessee (161 U. S. 134); New York *ex rel.* Met. Street Ry. Co. v. Tax Commissioners (199 U. S. 1).

[46] 96 U. S. 432.

[47] 100 U. S. 548.

[48] 146 U. S. 387.

[49] 166 U. S. 685.

construction to be given to the terms of a subsisting contract, or as to the validity of a contract. In other words, no claim as to the impairment of the obligation of a contract can be predicated simply upon the assertion that a State court has erred in its judgment as to the meaning or validity of a contract. It is thus only when there is a claim that there has been some law enacted and applied which operates to impair the obligation of a contract previously entered into, that the Federal question is raised that the prohibition of the Constitution has been violated.

In Lehigh Water Co. v. Easton [50] the court said: "The State court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void; or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by State legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the State Constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

The meaning to be given to a State law is primarily to be determined by the State courts, and, so long as only a question of State constitutional law is concerned, the meaning thus given is conclusive upon the Federal courts. Thus, when a State statute is alleged to impair the obligation of a contract it is not the duty of the Federal Supreme Court itself to construe the act and then to determine whether, as thus construed, it impairs the obligation of a contract; rather, its duty is to take the act as construed and applied by the courts of the State, and, upon that basis, to determine whether or not the obligation of contracts is impaired. The logic of this doctrine is apparent. Whatever may be the literal terms of a State law, if, in fact, it is not so construed by the State authorities as to work an impairment of contracts, the inhibition of the obligation clause cannot be said to be violated.

§ 517. Existence of a Contract a Federal Question.

The rule is well established that the Federal Supreme Court, when called upon to consider whether the obligation of a contract has been impaired, will determine for itself, that is, by its own independent judgment, whether or not that which is alleged to be a contract and to have been impaired by a State law is, in truth, a contract. That is to say, the Federal tribunal does not hold itself bound by the decision of a State court which escapes from the application of the obligation clause by holding that the contract, the impairment of which is alleged, is not, in fact, a contract.[51]

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[50] 121 U. S. 388.

This doctrine is, of course, applicable not only to the construction of instruments which, it is claimed, constitute contracts between individuals, but also to State laws which, it is alleged, amount to contracts on the part of the States. There has been no serious denial of this from the time of the early case of Fletcher v. Peck,[52] in which it was held that the inhibition of the obligation clause applies as well to contracts on the part of the States as to those between private individuals.

Furthermore, the Supreme Court will exercise its own independent judgment as to the constitutionality of a State law as tested by the State Constitution, when the law is one in which itself constitutes a contract on the part of the State, or supplies the legal basis for the contract which, it is alleged, is impaired by a later law.[53]

§ 518. Refusal of Federal Courts to Follow State Decisions Holding State Laws Void.

The cases which have been considered in the paragraphs which have gone immediately before have been ones in which there had been State legislation impairing contracts valid at the time entered into. In these cases the Federal court had sought to determine for itself whether these earlier laws were constitutional as tested by the State Constitutions of the States whose legislatures enacted them. We have now to turn to a class of cases in which the Federal Supreme Court, without considering as an independent proposition the constitutionality of State laws, has refused to follow the decisions of the highest State courts holding them to be void, when to do so would be to render null contracts which have been entered into, the parties thereto relying in good faith upon the validity of such laws. Here, it is to be observed, the Federal tribunal has not said that the State laws in question are to be treated as continuously constitutional and valid, that is, valid *in futuro*, the decisions of the State courts to the contrary notwithstanding, but only that contracts which have been entered into in reliance upon them are not to be affected by their unconstitutionality. Thus, in effect, the position is taken that laws which are unconstitutional as judged by the State Constitutions, and, therefore, void, may have a *de facto* character that will furnish a legal basis for contracts founded upon them.

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[51] Jefferson Branch Bank v. Skelly (1 Black, 436).

[52] 6 Cr. 87.

[53] State Bank v. Knoop (16 How. 369); Ohio Life Ins. Co. v. Debolt (16 How. 416); McGahey v. Virginia (135 U. S. 662).

§ 519. Distinction Between Cases Coming to Supreme Court by Writs of Error to State Courts and Those Originating in Lower Federal Courts as Regards the Force Ascribed to Decisions of State Courts.

In passing upon decisions of State courts overruling their own prior decisions and thereby holding invalid contracts entered into in reliance upon such prior decisions, there is a sharp distinction drawn by the Supreme Court between those cases in which the cause comes before the Federal courts because of the citizenship of the parties thereto, and thence by appeal to the Supreme Court, and those coming to it by writ of error to the highest State courts.

In the latter class of cases the only ground of Federal jurisdiction is that the obligation of a contract has been impaired; that, in other words, a right guaranteed by the Federal Constitution has been violated. In McCullough v. Virginia,[54] as in an unbroken line of previous cases, the members of the Supreme Court have all agreed that Federal jurisdiction exists only in case the decision of the State court appealed from has given effect to a State legislative act impairing a contract previously entered into.

In cases coming to the Federal Supreme Court by way of appeal from a lower Federal court, however, there is no question as to Federal jurisdiction, and, in them, the Federal courts determine for themselves which, if any, of the decisions of the State courts dealing with the State laws or with principles involved they will follow.

In this class of cases, the Federal jurisdiction of which is based upon the diversity of citizenship of the parties thereto, the doctrine is well established that where a State court has reversed its ruling as to the State law governing a case, the Federal courts will not follow the later decision, when to do so will make it necessary to hold void or to impair the obligation of contracts previously entered into. In other words, the first construction is treated as though it becomes a part of the law or constitutional provision, and the later and differing construction as a law in amendment or appeal thereof.[55] It may, however, be observed that the Federal courts would have found themselves in fewer logical and constitutional difficulties if they had decided these cases without any reference to the obligation of contracts clause, and solely upon the ground that they have the power, in suits between citizens of different States, to exercise an independent judgment as to when it is proper for them to follow the decisions of the State courts with reference to the construction of State laws. This subject is more fully treated in a later chapter.

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[54] 172 U. S. 102.

[55] Burgess v. Seligman (107 U. S. 20); Gelpcke v. Dubuque (1 Wall. 175).

Originally the Supreme Court went only so far as to protect a contract entered into under a law which had previously been held valid by the State courts, as against a later decision holding the law unconstitutional and void. Of late, however, the court has taken the further step of protecting contracts entered into under a law before its constitutionality has been upheld in the highest courts of the State, the argument being that a State legislative act is, even in advance of judicial affirmation, presumptively valid, and, therefore, a later ruling of the court to the effect that the law is invalid, operates to impair or destroy the obligation of the contracts which those entering into them had a right, at the time, to believe were legally enforceable agreements.

§ 520. Gelpcke v. Dubuque.

Disregarding the earlier case of Rowan v. Runnels [56] in which, though the point was involved and passed upon, the argument was not elaborated, the first important case in which the doctrine was clearly laid down that the Federal courts need not follow the latest decisions of the State courts construing State laws or constitutional provisions when to do so will be to impair the obligation of contracts entered into in reliance upon earlier decisions holding them void, was that of Gelpcke v. Dubuque,[57] decided in 1863. This case came up on appeal from a Federal District Court, and was a suit to recover upon certain bonds issued by the city of Dubuque, Iowa, which bonds had been issued under authority of an act of the State legislature. The constitutionality of this act had been upheld by the highest court of Iowa at the time the bonds were issued, but later decisions of that court had held the act unconstitutional, and, therefore, the bonds invalid. In its refusal to accept this last judgment of the Iowa Supreme Court, the Federal Supreme Court did not base its refusal upon the ground that the construction was unsettled,[58] for in its opinion, after quoting from Leffingwell v. Warren [59] that it would follow the latest "settled" adjudications, the court said: "Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine." The earlier decisions of the Iowa Supreme Court, the Federal Supreme Court said, were reasonable ones, "sustained by reason and authority," and "in harmony with the adjudications of sixteen of the States of the Union." But not upon this ground, also, was the construction of the later decisions repudiated. The refusal to follow them was based explicitly upon the doctrine that, relying upon the earlier decision, contracts had been entered into which would be impaired should the later decisions be followed. "However we may regard the late case in Iowa as affecting the future," said the court, "it can have no effect upon the past. 'The sound and true rule is that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' [60] The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law."

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[56] 5 How. 134.

[57] 1 Wall. 175.

[58] As to the rule regarding this see § 571.

[59] 2 Black, 599; 17 L. ed. 261.

It will be observed that in this case, though the earlier holding of the State Supreme Court as to the constitutionality of the act authorizing the bond was declared a reasonable one, it was not upon this ground that the later decision as to its unconstitutionality was repudiated. The relative merits of the earlier and the latest holding of the State court, as abstract propositions, were not passed upon. It was not asserted that, except as to contracts entered into prior thereto, the State law declared void by the latest decision of the State court was to be treated as a nullity.

The doctrine declared in Gelpcke v. Dubuque has been much criticized upon the double ground that it treats a decision of a State court as a "law" impairing the obligation of contracts, and that it implies an assumption upon the part of the Federal courts of a right, not simply to apply impartially as between citizens of different States the State law as it finds it (this, it is claimed, being the sole reason for which Federal jurisdiction in suits between citizens of different States is given), but to determine what that law is.

But, however open to technical criticism, the doctrine has since been repeatedly affirmed and may now be considered beyond dispute.[61]

§ 521. Extension of the Doctrine of Gelpcke v. Dubuque.

According to the doctrine declared in the Gelpcke case, contract rights acquired under a law which has been held constitutional by the

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[60] Quoted from Ohio Life Insurance & Trust Co. v. Debolt (16 How. 416).

[61] In Township of Pine Grove v. Talcott (19 Wall. 666), the court said: "The national Constitution forbids the State to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decision than by legislation."

In Douglass v. County of Pike (101 U. S. 677), the court said: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective not retrospective." See also Green Co. v. Conness (109 U. S. 104); Los Angeles v. Los Angeles Water Co. (177 U. S. 558).

State courts will be protected by the Federal courts from impairment by a later decision or decisions of those courts, in cases originating or brought into the lower Federal courts because of the diversity of the citizenship of the parties litigant. In later cases this rule has been extended to cover cases where contract rights have been acquired under a State law, presumably valid, which have not had their constitutionality affirmed by the State courts.[62]

§ 522. Great Southern Fireproof Hotel Co. v. Jones.

In Great Southern Fireproof Hotel Co. v. Jones [63] the authorities were carefully reviewed, and the doctrine definitely stated that the Federal courts will not hold themselves concluded by the decisions of State courts holding, though for the first time, State laws unconstitutional, in cases involving contract rights based upon such laws. That is to say, the Federal courts will determine upon their own dependent judgment whether the laws in question are to be held valid as tested by the State Constitutions, and if, when so tested, the laws are not in their opinion valid, the contract rights based upon them fall to the ground. The situation is thus quite different from that of the cases arising under the Gelpcke v. Dubuque rule where there had been diverse opinions upon the part of the State courts. There the contracts entered into in reliance upon the first decisions upholding the laws concerned were protected without reference to the correctness of the earlier decisions as compared with the later.

§ 523. Summary.

It appears from the cases which have been reviewed in the immediately preceding sections that the Supreme Court has declared the doctrine that, when necessary to preserve accrued rights, it will not, in cases coming to it from the lower Federal courts, be governed by the decisions of State courts with regard to the validity of State laws as tested by the State Constitutions. This doctrine has been declared in cases in which these rights have been alleged to be denied by reason of the impairment of the contracts upon which they have been based. It will, however, have appeared that it is extremely difficult if not impossible to justify this doctrine logically by a recourse to the prohibition of the Federal Constitution with regard to the impairment of the obligation of contracts. A more logical and consistent argument is to assert the general proposition that, in cases coming to it from the lower Federal courts, the Supreme Court, when it deems that substantial justice so demands, will exercise its own judgment and not be governed by prior opinions of the State courts as to the construction to be given to provisions of State laws and of State Constitutions. Thus, the Supreme Court would be able to hold fast to the doctrine so often declared by itself, and in absolute terms, that the prohibition of the Federal Constitution is directed exclusively to the legislative branch of the State Governments.

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[62] Havemeyer v. Iowa County (3 Wall. 294); Butz v. Muscatine (8 Wall. 575); Township of Pine Grove v. Talcott (19 Wall. 666); Pleasant Township v. Ætna Life Insurance Co. (138 U. S. 67); Folsom v. Township (159 U. S. 611); Stanley County v. Coler (190 U. S. 437); Great Southern Fireproof Hotel Co. v. Jones (193 U. S. 532).

[63] 193 U. S. 532.

It would seem that whatever recourse the Supreme Court may have had in earlier cases to the obligation of contracts clause of the Federal Constitution, it has, in its later decisions, placed itself more squarely upon the ground above indicated.[64]

When no question as to the constitutional validity of State laws has been involved, the Supreme Court has consistently and repeatedly declared that mere changes in State judicial decisions provide no basis for claim that a Federal right, arising under the obligation of contracts clause of the Constitution, has been denied; nor can such a claim be founded upon an assertion that a State court has erred in its construction of a statute or in the determination of what the common law declares.[65]

§ 524. Obligation of Contracts and Due Process of Law.

The guarantee against denial of due process of law by the States, as contained in the Fourteenth Amendment, is broader than the protection afforded by the obligation of contracts clause of Section 10, Article I of the Constitution in that it extends to non-contractual as well as contractual rights. It is, however, important to consider whether the obligation of contracts clause can serve as a protection against legislative action which cannot be brought within the scope of the constitutional prohibition that due process of law shall not be denied. This question is important not only with reference to the powers of State legislatures but also with reference to the Federal legislature since that body, though subject to the prohibition regarding due process of law, is not expressly forbidden to impair the obligation of contracts.

The subject of due process of law is considered in detail in later chapters, and it there appears that the constitutional protection afforded by the prohibition of a denial of due process of law has been given such a broad interpretation with reference to matters of procedural as well as substantive right that it is possible to bring within its scope most of the controversies which have been dealt with as arising under the obligation of contracts clause.[66] Thus, in Hepburn v. Griswold,[67] one of the Legal Tender cases, we find the court, with reference to the prohibition with regard to the impairment of the obligation of contracts, saying: "But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution."

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[64] See, for example, Tidal Oil Co. v. Flanagan (263 U. S. 444).

[65] Cross Lake Shooting and Fishing Club v. Louisiana (224 U. S. 632).

It will be observed that, in this *dictum*, care is taken to except laws enacted by Congress in pursuance of powers expressly given it. It would in fact seem to be established that, because Congress is not expressly prohibited from passing any law impairing the obligation of contracts, it may, in the exercise of powers that are expressly given it, enact laws the indirect effect of which is to impair the obligation of contracts previously entered into. Instances of this are seen in the national bankruptcy and legal tender laws.[68]

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[66] Of course, until the adoption of the Fourteenth Amendment there was no prohibition upon the States by the Federal Constitution as to the denial of due process of law.

[67] 8 Wall. 603.

[68] As throwing light upon the relation of the impairment of the obligation of contracts to the denial of due process of law, see the minority as well as the majority opinions in the Sinking Fund cases (99 U. S. 700).

CHAPTER LX

THE FEDERAL JUDICIARY: ITS ORGANIZATION

§ 525. Constitutional Provisions.

Article III, Section 1 of the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article II, Section 2, Clause 2 provides specifically that judges of the Supreme Court shall be nominated, and, by and with the advice and consent of the Senate, appointed by the President, and, by inference, the same is true of the other Federal judges.[1]

That the Constitution contemplates that there shall be a Chief Justice of the Supreme Court is shown by Article I, Section 3, Clause 6, which provides that when impeachments of the President are tried by the Senate the Chief Justice shall preside.

With the exception, then, of the tenure of office the protection against having their compensation reduced, and the mode of appointment of the judges, the organization of the Federal judiciary, including that of the Supreme Court, is wholly within the control of Congress.

The extent of the Federal judicial power is fixed by the Constitution itself, but the allotment of that jurisdiction to the several Federal courts is within the control of Congress except in so far as it is provided by Section 2, Clause 2, of Article III of the Constitution that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." In all other cases declared to be within the Federal judicial power, it is provided that the Supreme Court shall have appellate jurisdiction, both as to law and fact, but with such exceptions, and under such regulations as Congress may make. In effect, then, only the original jurisdiction of the Supreme Court with respect to certain specified cases is placed beyond the control of Congress.

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[1] There is no likelihood that it could be successfully contended that Federal judges, other than justices of the Supreme Court, may be deemed "inferior officers" the appointment of whom may be vested by Congress in the President alone, in the courts of law, or in the heads of departments.

The practice and procedure in the Federal courts is also within the control of Congress except as to certain mandatory provisions of the Constitution with reference to jury trial, second jeopardy, speedy and public trial, etc., most of which are found in the first eight amendments to the Constitution.[2]

The Judicial Article is not self-executory. Even the Supreme Court which is expressly provided for, requires for its existence an organizing statute of Congress.[3] However, once established, the Supreme Court becomes at once vested with the original jurisdiction specified for it by the Constitution.

§ 526. The Supreme Court: Its Organization.

By the Judiciary Act of 1789 the Supreme Court was constituted with a bench of a Chief Justice and five Associate Justices.[4] By act of 1801 the number of Associate Justices was decreased to four,[5] but, by an act passed only a year later,[6] the number was again made five. By act of 1807 [7] this number was increased to six; by act of 1837,[8] to eight, and, by act of 1863,[9] to nine. By act of 1866 it was provided that no vacancies in the position of Associate Justice should be filled until the number should be reduced to six, which number, when attained, should be maintained. By act of 1869, the number of Associate Justices was again raised to eight, a number which has not been since changed.

The Supreme Court holds annual terms beginning in October and lasting until the end of May.

§ 527. Inferior Federal Courts.

By the original Judiciary Act of September 24, 1789,[10] provision was made for two classes of inferior Federal tribunals to be known respectively as District and Circuit Courts.

The United States was divided into thirteen "districts" for each of which a District Judge and a District Court was provided. These districts were grouped into three circuits and provision made that two Circuit Courts should be held annually in each district in the circuits, which courts were to consist of any two Justices of the Supreme Court and the District Judge of the district, any two of whom should constitute a quorum.

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[2] However, as to the constitutional power of Congress to regulate the manner in which the Federal courts shall exercise their power to punish contempts, see § 728.

[3] Turner v. Bank of N. Am. (4 Dall. 8); Sheldon v. Sill (8 How. 441).

[4] 1 Stat. at L. 73.

[5] 2 Stat. at L. 89.

[6] 2 Stat. at L. 132.

[7] 2 Stat. at L. 420.

[8] 5 Stat. at L. 176.

[9] 12 Stat. at L. 794.

[10] 1 Stat. at L. 73.

The system of Federal courts thus provided for remained until 1891 without substantial modification, except as to the number of districts and circuits and of District Judges, and except for the changes provided for by the act of February 13, 1801,[11] which remained in force for only a year, being repealed by the act of April 29, 1802.[12] The act of April 10, 1869,[13] provided for nine Circuit Judges in order to decrease the burden of circuit work to be performed by the Supreme Court justices.[14]

In 1891 Congress [15] created a new class of Federal tribunals to be known as Circuit Courts of Appeals, one of which sits in each of the circuits.

By the act of March 3, 1911,[16] known as "The judicial Code," the Circuit Courts were abolished, their jurisdiction and other work being transferred to the District Courts.[17] Though there are thus no longer any Federal Circuit Courts there continue to be Federal Circuit Judges.[18]

Besides the now existing District Courts and Circuit Courts of Appeals, there are several special tribunals which belong to the Federal judicial organization. These are the Supreme Court and the Court of Appeals of the District of Columbia, the Court of Claims, and the Court of Customs Appeals.[19]

§ 528. Former Circuit Courts.

Although there are now no Federal Circuit Courts, it is necessary to say a few words regarding them since for nearly a century and a quarter they had a continuous existence as important parts of the Federal judiciary, and there still are Circuit Judges, though these have been provided for only since 1869.[20]

It is to be remarked, first of all, that the Circuit Courts had no jurisdictional relation to the judicial "circuits" into which, since the beginning, the United States has been divided, for the Circuit Courts while they existed, had jurisdiction only within the districts within which they might happen to sit.

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[11] 2 Stat. at L. 89.

[12] 2 Stat. at L. 156.

[13] 16 Stat. at L. 44.

[14] There were at that time nine circuits, a number which has not been since increased to ten.

[15] Act of March 3, 1891.

[16] 36 Stat. at L. 1156.

[17] While they existed the Circuit Courts had considerable exclusive original jurisdiction, in fact, of all the more important cases triable in the Federal courts, except those in admiralty or bankruptcy.

[18] There are also the Circuit judges originally appointed to the Commerce Court, who, since the abolition of that tribunal have been assigned to various of the circuits.

[19] The Commerce Court, while it existed, was a constituent unit of the Federal judiciary. It was established by act of June 18, 1910 (36 Stat. at L. 539) and abolished by a provision of the Deficiency Appropriation Act of October 22, 1913 (38 Stat. at L. 219). As to the rather doubtful status of the United States Customs Court, until 1926 known as the Board of General Appraisers, see *post* § 534.

[20] Except for thirteen months from February, 1801, to March, 1802.

The Judiciary Act of 1789 created the Circuit Courts, but the judges who sat in them were either the Justices of the Supreme Court or the District Judges. As thus originally constituted, the courts had both original and appellate jurisdiction. In 1891 their appellate jurisdiction was taken from them, so that, from then until 1911, when they were abolished, they were courts only of first instance. Thus, at present, though there are no Circuit Courts there are Circuit Judges who, together with District Judges, sit in the Circuit Courts of Appeals.

§ 529. Circuit Courts of Appeals: Organization of.

The Circuit Courts of Appeals owe their existence to the act of March 3, 1891, which provides that there shall be one such court in each of the nine circuits into which the United States is divided.

The courts are ordinarily composed of three judges, who may be either Circuit or District Judges, but they may, and sometimes do, sit with two judges. Section 120 of the Judicial Code provides:

"The Chief Justice and the Associate Justices of the Supreme Court assigned to each circuit, and the several District Judges within each circuit, shall be competent to sit as judges of the Circuit Court of Appeals within their respective circuits. In case the Chief Justice of the Supreme Court shall attend at any session of the Circuit Court of Appeals, he shall preside. In the absence of such Chief Justice, or Associate Justice, the Circuit Judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the Associate Justice, and the Circuit Judges, one or more District Judges within the circuit shall sit in the court according to such order or provision among the District Judges as either by general or particular assignment shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

§ 530. District Courts: Organization of.

There are now more than eighty District Courts and considerably more than a hundred District Judges. Each District Court, when sitting, is, however, presided over by a single judge. There is a District Court in Alaska with four divisions and four judges; a District Court in Hawaii with two District Judges; a District Court in the Virgin Islands, one in the Canal Zone, and one in Porto Rico.[21] If, and when, the public interest requires, the Chief Justice of the United States, or the Justice of the Supreme Court assigned to the circuit, or the Senior Circuit Judge thereof, may assign any Circuit Judge of a Judicial Circuit to hold a District Court within such circuit.

Ordinarily the District Court is presided over by a single judge. However, it has been provided by statute that, in certain important classes of cases, a specially organized court of three judges shall sit, of which judges one shall be a Circuit Judge or a Justice of the Supreme Court. Among the classes of cases thus triable are those arising under the Anti-Trust and Interstate Commerce Acts.

For each district a United States district attorney is appointed to represent the interests of the Federal Government. Marshals and other court officers are also provided. District Judges must reside within their respective districts. They may, when assigned by the Circuit Judge or Justice or the Chief Justice of the Supreme Court, hold the District or Circuit Court for any other district of the circuit within which their districts lie, and any one of them may upon the designation of the Chief Justice hold the District and Circuit Court of any District in a Circuit contiguous to his own.

§ 531. Court of Claims.

This tribunal was established by act of February 24, 1855.[22] It sits at Washington, D. C., and is composed of a Chief Justice and four Associate Justices, who are appointed by the President by and with the advice of the Senate and hold office during good behavior.

As originally constituted this tribunal can hardly be said to have been an inferior Federal court, or, indeed, a court at all, for it was not empowered to render decrees in the cases considered by it which were immediately operative and enforcible by appropriate writs. Its powers were, rather, those of an auditor or comptroller, and its judgments in the nature of rulings which, in order to become effective, needed to be approved by Congress. Thus, in Gordon v. United States [23] the Supreme Court refused to review the action of the Court of Claims in respect to a claim examined and allowed by it, upon the ground that it could not, under the statute, give a judgment which would be final and conclusive upon the parties. It was to meet the situation thus presented that Congress, by act of March 17, 1866,[24] enlarged the powers of the Court of Claims so that it might render final judgments, subject to appeals to the Supreme Court. As a result, as declared by the Supreme Court in United States v. Klein,[25] the Court of Claims became an inferior Federal court.

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[21] There is no District Court in the Philippines.

[22] 10 Stat. at L. 612.

[23] 117 U. S. 697 (appendix).

[24] 14 Stat. at L. 9.

§ 532. Courts of the District of Columbia.

The courts of the District of Columbia consist of Justices of the Peace Courts, Police Courts, a Supreme Court, and a Court of Appeals. These courts are not constitutional courts in which the judicial powers conferred by the Constitution are to be vested, but, like the courts in the Territories, are legislative tribunals, in the sense that they are created in virtue of the power of Congress to exercise exclusive legislation over the District of Columbia.[26] However, in James v. United States [27] it was held that the Supreme Court of the District was a "court of the United States" within the purview of Section 714 of the Revised Statutes providing for the retirement of judges.

§ 533. Court of Customs Appeals.

This tribunal was established by the act of August 5, 1909,[28] in order to relieve the then existing Circuit Courts from the trial of cases relating to the classification of goods and the customs duties leviable upon them, as well as to obtain a uniformity of holdings as to these matters. The court sits at Washington, D. C., for the most part, but may sit elsewhere. It consists of a Presiding Judge and four Associate Judges, three of whom constitute a quorum. However, the concurrence of three judges being required for a decision, the President of the United States has been given the authority to designate Circuit or District Judges to fill temporary vacancies in order that there may be more judges present than are actually required for a quorum.[29]

§ 534. United States Customs Court: Formerly the United States Board of General Appraisers.

By acts of June 10, 1890,[30] May 28, 1908,[31] and August 5, 1909,[32] original jurisdiction over cases and controversies arising out of the collection of the national customs revenue was transferred from the Federal District and then existing Circuit Courts to the Board of General Appraisers, with appeal to the United States Court of Customs Appeals, and, in certain cases, with ultimate appeal to the Supreme Court. The Board was given authority to determine questions arising in such cases under the Constitution and laws of the United States and under treaties between the United States and foreign countries.

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[25] 13 Wall. 128.

[26] See the statement of the court in its opinion in *Ex parte* Bakelite Corp. (279 U. S. 438), and cases there cited.

[27] 202 U. S. 401.

[28] 36 Stat. at L. 105.

[29] Judicial Code, § 188.

[30] 26 Stat. at L. 131.

[31] 35 Stat. at L. 406.

[32] 36 Stat. at L. 105.

By act of May 28, 1926,[33] Congress provided that thenceforth the Board should be known as the United States Customs Court, and its members as Chief Justice and Associate Justices thereof.

As at present constituted, according to Section 518 of the Tariff Act of 1922,[34] the court consists of nine members appointed by the President, by and with the advice and consent of the Senate, and hold office during good behavior, but are removable, after due hearing, by the President for neglect of duty, malfeasance in office, or inefficiency. The court is declared to possess "all the powers of a District Court of the United States for preserving order, compelling the attendance of witnesses, the production of evidence, and in punishing for contempt. Said Board [Court] shall have power to establish from time to time such rules of evidence, practice, and procedure, not inconsistent with law as may be deemed necessary for the conduct of its proceedings, in securing uniformity in its decisions and in the proceedings of the members thereof, and for the production, care, and custody of samples and of the records of said Board." It is clear, then, that, functionally, the institution is a court, and, that its justices, as regards their method of appointment and their tenure of office, satisfy the constitutional requirements of Federal judges, unless it be held that the statutory provision that the justices may be removed by the President for neglect of duty, inefficiency or malfeasance in office is inconsistent with their being so regarded. As to this it may be observed that, although it has been true that Federal judges have been held removable only by impeachment, the Constitution does not say that this is the only way in which they may constitutionally be removed. The only express provision is that they shall hold office during good behavior, and this is provided for with regard to the members of the Customs Court. However, in *Ex parte* Bakelite Corp.[35] it was held that this tribunal is a legislative and not a constitutional court.[36]

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[33] 44 Stat. at L. 669.

[34] 42 Stat. at L. 858 at p. 972.

[35] 279 U. S. 438.

[36] *United States Board of Tax Appeals.* It is clear that the Board of Tax Appeals created by the Title IX of the Revenue Act of 1924 (43 Stat. at L. 336) is not a branch of the Federal Judiciary, for Congress, in the act expressly declares it to be "an independent agency in the executive branch of the Government." Moreover, the term of office of its members is ten years, which is inconsistent with the constitutional provision regarding the tenure of Federal judges.

§ 535. Territorial Courts.

It is established that the courts created by Congress as parts of the governments of the Territories are not "Inferior Federal Courts." [37]

§ 536. United States Court for China, and Consular Courts.

The United States Court for China, and the Consular Courts provided for the exercise, under treaties, of extraterritorial jurisdiction by the United States in foreign countries are not inferior Federal courts.[38]

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[37] *Ante*, § 535. See Clinton *et al.* v. Englebrecht (13 Wall. 434); Hornbuckle v. Toombs (18 Wall. 648); Good v. Martin (95 U. S. 90); Balzac v. Porto Rico (258 U. S. 298); McAllister v. United States (141 U. S. 174); Downes v. Bidwell (182 U. S. 244).

[38] *In re* Ross (140 U. S. 453).

CHAPTER LXI

FEDERAL COURTS: THEIR RESPECTIVE JURISDICTIONS

§ 537 The Supreme Court: Original Jurisdiction.

The jurisdiction of the Supreme Court is of two kinds—original and appellate. The appellate jurisdiction is, in turn, of two kinds; that coming by way of writs of error to (now appeals from) the courts of the States, and that by appeal from the inferior Federal tribunals. The original jurisdiction is determined by the Constitution,[1] which provides that "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

It has been held that it is not competent for Congress to give to the Supreme Court original jurisdiction in other than these specifically enumerated cases. This doctrine is deduced from the constitutional provision that "in all the other cases . . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." [2]

§ 538. Inferior Courts May Be Granted Jurisdiction of Cases within the Original Jurisdiction of the Supreme Court.

The implication from the foregoing, expecially from the last clause, might seem to be that the Supreme Court may not take appellate jurisdiction in cases in which it might exercise original jurisdiction, and, therefore, that it would not be within the power of Congress to give to the inferior Federal courts original jurisdiction over causes cognizable in the first instance by the Supreme Court. Congress has, in a number of instances, granted such original jurisdiction to inferior Federal courts, and there are a number of judicial *dicta* in support of the constitutionality of the practice.[3]

§ 539. Supreme Court: Appellate Jurisdiction.

The appellate jurisdiction of the Supreme Court, together with the entire jurisdiction of all the inferior Federal courts, is wholly [4] within the control of Congress under the constitutional provision that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and that "in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make."

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[1] Art. III, Sec. 2.

[2] Art. III, Sec. 2, Cl. 3.

[3] See especially Ames v. Kansas (111 U. S. 449). *Cf.* Garland & Ralston, *Constitution and Jurisdiction of the United States Courts*, § 7.

[4] Except that facts passed upon by a jury may not be reviewed by a Federal Court, except so far as the rules of the common law permit.

These exceptions and regulations which Congress is thus authorized to make have reference to the granting and regulation of appeals to the Supreme Court, and the process by which appeals thither shall be taken and perfected. This it may do either by failing to grant original jurisdiction to the inferior courts, or by providing that their jurisdiction, when granted, shall be final.

In order to grant relief to the Supreme Court from the pressure of cases coming to it, the right of litigants to resort to it by writ of error or appeal has been greatly limited, but with the right reserved to the Supreme Court by certiorari to review such cases, on such points of law as it may deem desirable.

The act of Congress approved February 13, 1925,[5] marks the last step in this progress.

It is not practicable to set forth in details the present appellate jurisdiction of the Supreme Court. These details may be found stated in Sections 237 to 240 of the Judicial Code as amended by the act of 1925. It is, however, desirable to say that much of this jurisdiction is discretionary in character, being exercised by writs of certiorari, and the remainder by appeals.[6] As the law now stands, appeals of right may be taken to the Supreme Court in only the following four classes of cases: (1) where a State court has upheld a State statute claimed to be repugnant to the Federal Constitution or laws or treaties of the United States, or where such court has held invalid a statute or treaty of the United States; (2) where a Circuit Court of Appeals has held a State statute to be repugnant to the Federal Constitution or laws or treaties of the United States; (3) from decisions of the specially constituted District Courts (known as "Statutory" District Courts) for the trial of suits to enjoin the enforcement of a State statute or an order of a State board or commission, or to set aside orders of the Interstate Commerce Commission (other than for the payment of money) or the orders of the Secretary of Agriculture under the Packers and Stockyards Act; and (4) cases certified to the Supreme Court by Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, and the Court of Claims.[7]

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[5] 43 Stat. at L. 936.

[6] By act of January 31, 1928, as amended by act of April 28, 1928, it is provided that writs of error in cases civil and criminal should be abolished, and that all relief formerly to be obtained by such writs should thereafter be obtainable by appeal.

It is important to point out that the Supreme Court now has jurisdiction to reverse, modify, or affirm the judgments or decrees of all State courts of last resort in which is determined the constitutional validity or invalidity of a statute or treaty of the United States, or in which is similarly determined the validity or invalidity of a State statute as tested by the provisions of the Constitution of the United States.[8]

In order to obtain by certiorari a review by the Supreme Court, of a decision of a State court it must appear that the decision was final; that a substantial Federal question was involved; or that the decision was with regard to a Federal question not previously determined by the Supreme Court; or that the decision was not in accord with applicable previous decisions of that court.

In the exercise of its discretion, the Supreme Court grants petitions for certiorari upon the affirmative vote of four of its nine justices.

§ 540. Writs of Error to State Courts: Constitutionality of.

The constitutionality of this power of the Supreme Court to revise judgments and decrees of the State courts, a power first given it by Congress in the Judiciary Act of 1789, and ever since continued, has been considered in an earlier chapter of this treatise.[9]

In cases brought to the Supreme Court from the State courts, the judgment of these courts will not be reversed, whatever construction they may have given to an alleged Federal right, if it appear that there was a local law which, rightly interpreted, would sustain the judgment entered or decree given.[10]

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[7] Also, under certain provisions of the Criminal Code, the United States Government may appeal directly to the Supreme Court from the regular District Courts. Also, in suits brought by the United States to enjoin violations of the Anti-Trust Laws, the aggrieved parties may take an appeal directly to the Supreme Court.

[8] The twenty-fifth section of the Judiciary Act had given a right of appeal to the Supreme Court only in cases in which the decision had denied the Federal right set up. This provision remained unchanged until the act of December 23, 1914 (38 Stat. at L. 790), which authorized the Supreme Court, by certiorari, to review decisions sustaining the asserted Federal right. By act of September 6, 1916 (39 Stat. at L. 726), it was provided that a review by the Supreme Court might be had only by a writ of certiorari obtained from the Supreme Court in all cases in which the decision in the State court in which any title, right, privilege or immunity might be claimed under the Federal Constitution, or treaty or statute of, or commission held or authority exercised under, the United States, was either in favor of or against such title, right, privilege, immunity, commission or authority.

[9] See Chapter II.

[10] Neilson v. Lagow (12 How. 98); Maguire v. Tyler (8 Wall. 650); Keith v. Clark (97 U. S. 454); Klinger v. Missouri (13 Wall. 257); Johnson v. Risk (137 U. S. 300).

In De Saussure v. Gaillard [11] the general rule was declared to be that to give the Supreme Court jurisdiction on a writ of error to a State court, "it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

§ 541. Circuit Courts of Appeals: Jurisdiction.

By Section 128 of the Judicial Code the Circuit Courts of Appeals had appellate jurisdiction over the District Courts in all cases except those carried directly to the Supreme Court—as provided in Section 238 of the Code: and its judgments were made final "in all cases in which the jurisdiction [in the District Courts] is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the United States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases." Where the jurisdiction of the District Courts had been based, in whole or in part, upon a Federal question being involved, a writ of error or appeal lay from the Circuit Court of Appeals to the Supreme Court.

In a line of cases [12] it has been held that where the jurisdiction of the District Court is invoked on the sole ground that a substantial question under the Federal Constitution, Federal statutes or treaties is involved, the appellate jurisdiction is exclusively in the Supreme Court.

By the act of February 13, 1925, the Circuit Courts of Appeals are given appellate jurisdiction to review final decisions of the District Courts in all cases except where there is a direct appeal to the Supreme Court.

The Circuit Courts of Appeals, by the act of 1925, are also given appellate jurisdiction to review judgments, in all cases, of the United States District Courts for Hawaii and for Porto Rico; of the District Courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000, in all other criminal cases where the offence charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings: of the District Court for the Canal Zone in the cases and mode prescribed in the act of September 21, 1922, amending prior laws relating to the Canal Zone;[13] of the Supreme Courts of the Territories of Hawaii and Porto Rico, in all civil cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved, and in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5000, and in all habeas corpus proceedings; and of the United States Court for China, in all cases.

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[11] 127 U. S. 216. See also Johnson v. Risk (137 U. S. 300).

[12] See McMillan Contracting Co. v. Abernathy (263 U. S. 438).

The Circuit Courts of Appeals are also given appellate jurisdiction to review the interlocutory orders or decrees of the District Courts which are specified in Section 129 of the Judicial Code as amended by the act of 1925.[14]

Furthermore, the Circuit Courts of Appeals are empowered to review decisions of the District Courts sustaining or overruling exceptions to awards in arbitrations, as provided in Section 8 of the act of July 15, 1915,[15] with regard to mediation, conciliation and arbitration in controversies between certain employers and employees; and also to exercise appellate and supervisory jurisdiction under Sections 24 and 25 of the Bankruptcy Act of July 1, 1898,[16] over all proceedings, controversies, and cases had or brought in the District Courts under that act or any of its amendments, and to exercise this jurisdiction in the manner prescribed in those sections.[17]

Still further, the Circuit Courts of Appeals are empowered to "enforce, set aside, or modify" orders of the Federal Trade Commission as provided in Section 5 of the act of September 26, 1914,[18] orders of the Interstate Commission, the Federal Reserve Board, and the Federal Trade Commission as provided in Section 11 of the act of October 15, 1914.[19]

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[13] 42 Stat. at L. 1006.

[14] "SEC. 129. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 239 and 240 shall apply to such cases in the circuit courts of appeals as to other cases therein: *Provided*, That the appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof: *Provided, however*, That the district court may, in its discretion, require an additional bond as a condition of the appeal."

[15] 38 Stat. at L. 107.

[16] 38 Stat. at L. 553.

[17] The act specifies the Circuit Courts of Appeals which, respectively, shall exercise the foregoing jurisdiction over judgments and decrees from the different district and bankruptcy courts.

[18] 38 Stat. at L. 720.

Judgments and decrees of the Circuit Courts of Appeals are without review by the Supreme Court (except by certiorari) except those specified in Section 240 of the Judicial Code as amended by the act of 1925.[20] The same is true of judgments of the Court of Appeals of the District of Columbia and the Court of Claims.

In order to obtain a review, by certiorari, of a decision of a Circuit Court of Appeals, the petitioner must show that the decision is in conflict with decisions in other circuits; or that a question of local law or an important question of general law has been improperly decided or that it is in conflict with decisions of local or State tribunals; or that an important question of Federal law has been decided in a manner that causes it to conflict with applicable decisions of the Supreme Court; or that the question involved has not been, and should be, decided by that court.

§ 542. District Courts: Jurisdiction.

The District Courts have appellate jurisdiction only with reference to judgments and orders of the United States Commissioners in cases arising under the Chinese Exclusion Laws.[21]

With the exceptions which have been noted, the jurisdiction of the Federal District Courts is original. It will not be practicable to state this jurisdiction in detail.[22] It will be sufficient to say that this jurisdiction extends to the trial of all cases coming within the Federal judicial power, for which statutory provision has been made, except in the few cases in which, as elsewhere noted in this chapter, other Federal courts have been given exclusive original jurisdiction. It may be noted, however, that by Section 12 of the act of February 13, 1925, it has been declared that the District Courts shall not have jurisdiction of any action or suit by or against any corporation upon the ground that it is incorporated by or under an act of Congress, unless the government is the owner of more than one-half of the capital stock of such corporation.

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[19] 38 Stat. at L. 735.

[20] "Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case." Judicial Code, Section 240b.

[21] The District Court for the district of Wyoming has original jurisdiction of all felonies committed within the Yellowstone National Park, and appellate jurisdiction of judgments in cases of conviction before the Commissioner appointed under Section 5 of the act of May 7, 1894, to protect the birds and animals in the Park. The District Court for the district of South Dakota has jurisdiction to try actions and proceedings in which persons are charged with murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.

For the foregoing, see Sections 25–27 of the Judicial Code.

[22] This may be found in Chapter 2 of the Judicial Code.

§ 543. Court of Claims: Jurisdiction.

The jurisdiction of the Court of Claims is set forth in Section 145 of the Judicial Code, the details of which it is not necessary to set forth. It is sufficient to say that they specify the cases in which contractural claims against the United States may be prosecuted.

CHAPTER LXII

GENERAL CONSIDERATION OF THE JURISDICTION OF THE FEDERAL COURTS

§ 544. Federal Judicial Power.

Section 1 of Article III of the Constitution provides in imperative terms that the judicial power of the United States (the extent of which is stated in Section 2 of the same Article) "shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." It would seem to be clear, then, that this judicial power may be vested only in such courts. It is, however, to be observed that, in stating the extent of the Federal Judicial power, the Constitution provides that, as to cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority, as to cases affecting ambassadors and other public ministers and consuls, and as to cases of admiralty and maritime jurisdiction, it is declared that all such cases are included; whereas, as to controversies between two or more States, between a State and citizen of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens and thereof foreign States, citizens or subjects, the word "all" is omitted.

There has been some discussion, but no authoritive decisions of the Supreme Court, as to the possible distinction between the terms "cases" and "controversies" as employed in the constitutional clause just quoted, and as to the significance of the fact that the word "all" is not applied to the enumerated controversies. However, as regards this latter point we find the following *obiter dictum* by Chief Justice Fuller in his opinion in Stevenson v. Fain:[1] "The use of the word 'controversies' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."[2]

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[1] 195 U. S. 165.

[2] In Fisk v. Henarie (32 Fed. Rep. 417) the court suggested that the distinction between the terms "cases" and "controversies" was that a "case" might include more than one item of dispute or controversy, and that, in such case, only the "controversy" and not the whole case might be cognizable by the Federal courts. *Cf.* Muskrat v. United States (219 U. S. 346) and Old Colony Trust Co. v. Commr. of Internal Revenue (279 U. S. 716).

No jurisdiction can be vested by Congress in the Federal courts beyond that provided for in the Constitution.[3]

§ 545. Federal Judicial Power May Not Be Vested in Other than Federal Courts.

It is established that Congress cannot vest the exercise of Federal judicial power in tribunals not created by itself, and, even as to tribunals thus created, they must be either the Supreme Court or inferior Federal courts. Thus, it is only upon the ground that the judicial power which is exercised by the Territorial courts is not included in the Federal judicial power as defined in Article III of the Constitution that this jurisdiction has been justified by the court.[4]

However, as will appear in the next section, Congress can permit the State courts, in the exercise of jurisdiction vested in them by State law, to entertain suits the prosecution of which might constitutionally be vested exclusively in the inferior Federal courts; also, Congress may delegate to State courts the performance of certain routine functions which do not involve the trial of "cases."[5] Any State chancellor, judge, justice of the peace, etc., may cause to be arrested and committed or held to trial any person charged with an offence against the United States.

§ 546. State Courts May Be Permitted, in the Exercise of Their Several Jurisdictions, to Deal with Causes which are within the Federal Judicial Power.

Congress has the undoubted power to vest exclusively in the Federal courts the cases or controversies enumerated in Article III of the Constitution. In some cases this is constitutionally obligatory. In other cases it is optional, and, in the exercise of this option, Congress has permitted the State courts to exercise jurisdiction over cases which it might have made exclusive in the Federal courts. When dealing with causes of this character, the courts, it is to be emphasized, are not exercising a jurisdiction vested in them by Federal law. Upon the contrary, they are exercising a jurisdiction vested in them by the Constitution or laws of their several States. In these cases the jurisdiction of the State courts may be concurrent with that of the Federal courts, that is, the plaintiff may have the option as to the court in which he will bring his suit, or, the jurisdiction may be qualified by the right of the defendant, if he sees fit, to have the cause removed before trial into a Federal court, or, after trial, the case may be taken by appeal, writ of error, or certiorari, to the Federal Supreme Court.[6]

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[3] Trade Mark cases (100 U. S. 82)

[4] Am. Insurance Co. v. Canter (1 Pet. 511). See also *Ex parte* Bakelite Corp. (279 U. S. 438, 449, 450).

[5] *Cf.* Robertson v. Baldwin (165 U. S. 275).

Generally speaking, when a corporation created by Federal law is a party to a suit, the cause is viewed as one arising under a law of the United States, and, therefore, Federal jurisdiction attaches. However, Congress has specifically provided that no suit may be brought by or against a railroad solely upon the ground that it is incorporated by act of Congress;[7] and, by Section 12 of the act of February 12, 1925,[8] it is provided that "no District Court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: *Provided,* that this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one half of its capital stock."

Congress has also declared that National Banks shall, as regards suits by or against them, be regarded as citizens of the States in which they are located, and, therefore, such suits may not be instituted in Federal courts unless, upon grounds other than that of their status as Federal institutions, Federal jurisdiction attaches.[9]

§ 547. Cases in which Federal Jurisdiction Made Exclusive.

As will later appear [10] the Federal jurisdiction in admiralty causes is necessarily exclusive in character. However, as will also appear, this fact does not prevent parties from litigating disputes which have their origin in maritime transactions, provided they are willing to accept such relief as the State courts, under State law, are competent to give.

Prize cases have, by Congress, been placed within the exclusive jurisdiction of the Federal courts.

Similarly, exclusive Federal jurisdiction has been provided for all cases arising under the Patent, Copyright and Bankruptcy laws of Congress.

The Federal courts have exclusive jurisdiction in all cases in which the United States is a party, to controversies between the States of the Union, and to suits by a State against citizens of another State.

Jurisdiction over suits affecting ambassadors, other public ministers and consuls is exclusive in the Federal courts. Though not so stated in the Constitution, it is established that these suits are only such as affect the diplomatic and consular representatives accredited to the United States by foreign powers, and do not include those affecting representatives of the United States.[11]

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[6] Houston v. Moore (5 Wh. 1); The Moses Taylor (4 Wall. 411); Claflin v. Houseman (93 U. S. 130).

[7] Act of January 28, 1915; 38 Stat. at L. 804.

[8] 43 Stat. at L. 936.

[9] The foregoing does not apply to receivers of National Banks, who are regarded as officers of the United States. Murray v. Chambers (151 Fed. Rep. 142).

[10] *Post* Chapter LXV.

§ 548. Ancillary Powers of Federal Courts.

From the fact that all Federal courts are courts of limited jurisdiction, it results that, in cases brought before them, the records must show affirmatively the grounds upon which the Federal jurisdiction is claimed to exist.

However, the Federal courts have been held to possess, by necessary implication, and without express congressional grant, the powers necessary to maintain their own dignity and order, including the power to punish for contempts, and to make rules governing their own procedure.[12] These rights are, however, subject to be limited or regulated by Congress, as has been done in a number of ways. Thus, for example, Section 268 of the Judicial Code provides that the power of the Federal courts to punish for contempts shall not extend "to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." [13]

§ 549. Habeas Corpus: Power of Federal Courts to Issue Writs of.

Congress has provided in express terms that the Supreme Court, its several justices, the Circuit Courts of Appeals and their several judges and the District Courts shall have the power to issue writs of habeas corpus. It is, however, provided that the writ "shall in no case extend to a prisoner in jail unless where he is in custody under or by color of authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States, or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted to be done under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; [14] or unless it is necessary to bring the prisoner into court to testify." [15]

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[11] *Ex parte* Gruber (269 U. S. 302). In Ohio *ex rel.* Popovici v. Agler (280 U. S. 379), it was held that, notwithstanding what would appear to be the meaning of the words of the Constitution, a suit against a foreign consul to the United States for divorce must be brought in a State court.

[12] United States v. Hudson (7 Cr. 32).

[13] Jud. Code, Sections 751, 752.

It has been held that the authority given to the Supreme Court to issue the writ enables it to do so only as ancillary to its original jurisdiction or when the questions raised are of an appellate nature [16] and, in general, it may be said that the Federal courts will decline to issue the writ except when necessary to uphold an asserted Federal right. Thus, in Duncan v. McCall,[17] the court refused to issue the writ to release a prisoner in a State court in advance of the decision by the court from which an appeal might be taken to the Federal courts in order to correct any denial thereby of a Federal right. Thus, in general, the Federal courts have refused to employ the writ in place of an appeal upon writ of error to correct mere procedural errors.[18]

With regard to the use of the writ in extradition proceedings, the Supreme Court, in a comparatively recent case,[19] has said: "It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing, and habeas corpus is available only to inquire: (1) Whether the magistrate had jurisdiction, (2) Whether the offence charged is within the [extradition] treaty, and, by a somewhat liberal extension, (3) Whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." [20]

In general, with reference to persons in the custody of State officials, it may be said that the Federal courts issue the writ: (1) after indictment or even conviction, to test the jurisdiction of the State court, upon the ground that the State law purporting to give the jurisdiction is unconstitutional as tested by the Federal Constitution: [21] and (2) before conviction, when the accused sets up a Federal authority for the act charged against him. In such cases the Federal court will try the whole case and either release the prisoner or remand him to the State authorities.[22]

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[14] The possible embarrassments arising out of the lack of such a provision became apparent at the time of the McLeod case (1 Hill, 377; 25 Wend. 483).

[15] Rev. Stat. Section 453.

[16] *Ex parte* Clarke (100 U. S. 399).

[17] 139 U. S. 449.

[18] The cases upon this point are many, but among them may be cited *Ex parte* Harding (120 U. S. 782); Valentina v. Mercer (201 U. S. 131); Henry v. Henkel (235 U. S. 219); Frank v. Mangum (237 U. S. 309); Knewel v. Egan (268 U. S. 442).

[19] Fernandez v. Phillips (268 U. S. 311).

[20] For an excellent general account of "Habeas Corpus in the Federal Courts," see the article of this title by A. M. Dobie in 13 *Virginia Law Review*, 433.

[21] As in *Ex parte* Siebold (100 U. S. 371).

§ 550. The States May Not Control or Limit the Exercise of Federal Judicial Power.

The jurisdiction of all Federal courts is a limited one, being circumscribed by the provisions of the Federal Constitution and the statutes of Congress in pursuance thereof, and it scarcely needs be said that, in the exercise of this jurisdiction, these courts are not subject to the control of State law, nor is State law competent to add to or subtract from that jurisdiction. Thus it has been held that the distinction between law and equity, which is recognized by the Constitution in the provision that the Federal judicial power shall extend to all cases "in law and equity" arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, will be adhered to by the Federal courts even when they are called upon to enforce the laws of States which, by statute, have weakened or abolished that distinction as established by the common law.[23]

That a State cannot withdraw from Federal judicial cognizance a matter or cause coming within that cognizance as fixed by the Constitution and laws of Congress is fully established.[24]

§ 551. Federal Question.

The Constitution provides that the Federal judicial power shall extend to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

In order that Federal judicial power may attach under this grant it is necessary that the controversy shall constitute what in law is technically known as a "case"; and that, for its decision, the enforcement of some Federal right is substantially involved.

A case is not brought within Federal judicial cognizance simply because, in the progress of the litigation, it becomes necessary to refer to or give a construction to the Federal Constitution or laws of the United States. "The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved." [25]

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[22] In the case of Federal revenue officers there is a special Federal statute which provides that, when there is alleged a Federal right to do the act charged against him, he may have the case removed, even before indictment, to the Federal courts. Judicial Code, Section 33.

In the court's opinion in *Re* Neagle (135 U. S. 1), will be found an extended account of the reasons leading to the progressive extension by Congress of the authority of the Federal courts to issue the writ of habeas corpus.

[23] *Cf.* Scott v. Neely (140 U. S. 106).

[24] Chicago & N. W. R. Co. v. Whitton (13 Wall. 270).

In order that a case may be brought within the scope of the Federal judicial power, it is sufficient that it involve as one of its ingredients a matter falling within the terms of Section 2 of Article III of the Constitution.[26]

Unless the Federal right basis appears in the record, that is, unless a right, privilege, authority, or immunity arising under the Federal Constitution or the law or treaties of the United States is set up, by the plaintiff or complainant, Federal jurisdiction will not attach. The fact that the defendant may set up a Federal right, privilege, or immunity is not sufficient, for the case must arise under the Federal Constitution, treaties or laws.

In Starin v. New York City,[27] we find Chief Justice Waite defining a "Federal question" as follows: "The character of a case is determined by the questions involved. If, from the questions, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States . . . otherwise not."

If the plaintiff or complainant does not himself set up the Federal right, privilege or immunity, Federal jurisdiction will not attach by reason of an allegation of what the defendant may or will set up by way of defence.[28]

An inspection of the provisions of the Judicial Code with reference to the matter shows that in none of the cases in which the jurisdiction of the Federal courts is based upon the existence of a Federal question, is there a limitation as to the amount of money or value of property that must be involved.

In Henry v. Dick Co.[29] the court pointed out how it may often depend upon what remedy a complainant is seeking whether a right arising, or claimed to arise, under a Federal law is involved. Thus, in this case, the complainant might have sued in the State courts upon a broken contract, or for its enforcement, but, instead, brought action for infringement of a patent right, which, being a right created by Federal law, he was entitled to enforce in the Federal courts.

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[25] Gold Washing & Water Co. v. Keyes (6 Otto 199). See also Gableman v. Peoria R. Co. (179 U. S. 335); Shoshone Mining Co. v. Rutter (177 U. S. 505); Joy v. St. Louis (201 U. S. 332); Louisville & W. R. Co. v. Mottley (211 U. S. 149).

[26] Osborn v. Bank of United States (9 Wh. 738).

[27] 115 U. S. 248.

[28] Devine v. Los Angeles (202 U. S. 313).

[29] 224 U. S. 1.

§ 552. Removal of Suits from State to Federal Courts.

The protection of Federal law and Federal rights against possible invasion by State law and State authorities may be secured in three ways. First, by vesting in the Federal courts exclusive cognizance of all cases in which the enforcement of Federal rights created or recognized by the Constitution, treaties, or congressional statutes, is involved; Second, by providing that all cases, involving these rights, which originate and are prosecuted in the State courts may be finally appealed to the Federal courts; and, Third, by providing that such cases begun in the State courts may at some stage prior to final judgment therein, be removed into the Federal courts. All these methods have been employed since the beginning of the present government.

In the early years under the Constitution chief reliance for the ultimate protection of Federal rights against State invasion was laid upon the right of appeal to the Supreme Court of the United States by writ of error to the State courts having final jurisdiction of a case in which Federal rights, privileges, and immunities were involved, and in which the final decision was adverse to the Federal rights, privileges, and immunities claimed. With respect to very many matters of which jurisdiction might have been granted to the inferior Federal courts, no such jurisdiction was given by Congress to the Federal courts, these suits being left to the adjudication of the State courts, with the provision that certain cases might be removed into the Federal courts, and that in all cases not so removed or removable, appeal might be had to the Federal Supreme Court when the final State judgment was adverse to the alleged Federal right, privilege, or immunity.

§ 553. Statutory Provisions for Removal from State to Federal Courts.

By the original Judiciary Act of 1789 it was provided that suits brought in State courts might be removed into the Federal courts only in case all the necessary defendants were aliens or all the necessary plaintiffs were citizens of the State and all the necessary defendants were citizens of another State and all joined in the petition for removal. By the act of 1866 individual defendants were permitted to remove if their interests could be properly adjudicated without the presence of the other defendants.

By act of 1867 either a plaintiff or defendant could remove upon affidavit that local prejudice would prevent a fair trial. By act of 1887 this right was limited to the defendant. By act of 1875 it was declared that either defendant or plaintiff might remove any case of which the Federal Circuit and the State courts had concurrent jurisdiction. By acts of 1887 and 1888 the jurisdiction of the Circuit Courts was considerably reduced, which of course had the effect of reducing the rights of removal provided for by the act of 1875.

The laws at present governing removal of suits to the Federal Circuit Courts are embodied in Sections 28 to 39 (as amended) of the Judicial Code.

§ 554. Mandamus to Remand to State Courts Causes Improperly Removed to Federal Courts.

In Maryland v. Soper [30] it was held by the Supreme Court, in exercise of its original jurisdiction, upon suit of the State of Maryland, that a mandamus might properly issue to a lower Federal court to remand to the courts of that State a cause which the lower Federal court had held was removable from the State courts to itself, but which the Supreme Court held to be not properly so removable.

§ 555. Jurisdiction of Federal Courts Based upon Diversity of Citizenship.

By the Constitution jurisdiction in the Federal courts may be founded upon either the subject-matters enumerated in Article III, or upon the character of the parties, that is, where the controversy is one to which the United States is a party, or between two or more States, between a State and citizens of another State, between citizens of different States, or between a State or a citizen thereof and foreign States, citizens or subjects.

Within the meaning of the clause of the Constitution extending the Federal judicial power to suits between citizens of different States it has been held that any person who is a citizen of the United States, native or naturalized, is a citizen of the State in which he is domiciled.[31]

United States citizens domiciled in the Territories or the District of Columbia do not come within this rule.[32]

In Strawbridge v. Curtiss [33] it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must, by reason of citizenship of another State, be capable of suing each of the defendants in a Federal court, in order to sustain the Federal jurisdiction. This doctrine, thus declared, has never been departed from.[34]

In Supreme Tribe of Ben Hur v. Cauble,[35] it was held that the jurisdiction of a Federal District Court was not defeated by the intervention as plaintiffs of other members of a class of persons who were citizens of the same State as the defendants; and that, having properly acquired jurisdiction by reason of the diversity of the citizenship of the original parties, and having proceeded to a final decree, the court might, without regard to their citizenship, enjoin other members of the class from maintaining suits in State courts to relitigate the questions settled by the Federal decree.

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[30] 270 U. S. 9 and 36.

[31] Mere residence in a State is not sufficient. Neel v. Penn. Co. (157 U. S. 153).

[32] New Orleans v. Winter (1 Wh. 91); Hepburn v. Ellzey (2 Cr. 445).

[33] 3 Cr. 267.

[34] See Hooe v. Jamieson (166 U. S. 395), and cases there cited.

[35] 255 U. S. 356.

In Niles-Bement-Pond Co. v. Iron Moulders' Union,[36] the Federal court refused to take jurisdiction when it appeared that a defendant corporation was wholly controlled by a plaintiff corporation, and, therefore, that there was no real collision of interest between them, so that it might be made a plaintiff in the case, with the result that one of the plaintiffs would be a citizen of the same State as the defendant.

§ 556. Citizenship of Corporations.

It was early decided that a corporation is not a citizen within the meaning of the clause providing that the Federal judicial power shall extend to controversies between citizens of different States, and, in theory, this is still the law; but if each corporation were conclusively presumed to be a citizen of the State by which it is chartered the practical results would be precisely the same as it now is and for many years has in fact been. Until about 1840, however, the doctrine prevailed that a corporation being an artificial unit, the court would look behind its corporate personality to see whether the individuals of which it was composed were, each and every one of them, citizens of a State different from that of each of the parties sued. But in later cases this doctrine was repudiated, and the principle stated, first, that the citizenship of the individuals composing the corporation is to be presumed to be that of the State by which the company was chartered, and, still later, that this presumption is one that may not be rebutted.[37]

This presumption, conclusive as to the citizenship of the corporation, is no presumption at all as to the citizenship of one of the individual stockholders in case that individual stockholder sues or is sued by the corporation even when such suit is brought to enforce rights or liabilities directly resulting from his relation as a stockholder. In such case a stockholder, if a plaintiff, may assert that he is a citizen of the State in which his citizenship actually is, and he may describe himself as a stockholder of the defendant corporation and yet the Federal courts will conclusively presume that every stockholder of the defendant corporation is a citizen of the same State as that which chartered the corporation.[38]

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[36] 254 U. S. 77.

[37] Ohio & Miss. R. Co. v. Wheeler (1 Black, 286).

[38] Louisville Cinn. & Charleston R. R. Co. v. Letson (2 How. 497).

A corporation created by the concurrent action of two or more States is foreign to each of them. This was so held in Nashua, etc., R. Co. v. Boston, etc., R. Co.[39] It thus would seem that a corporation which has obtained a charter from two States can, if sued in either one of them, remove into the Federal courts on the ground that it is a citizen of the other State. Reciprocally, being regarded as a citizen of each of the States from which it has obtained a charter, a corporation cannot claim diversity of citizenship when it sues a citizen of any one of those States.[40]

The fiction as to the citizenship of a corporation, as applied to Federal jurisdiction based upon diversity of citizenship, has not been applied to joint-stock companies, partnerships, etc.[41]

In St. Louis & San Francisco Ry. v. James [42] the doctrine was advanced, but rejected by the court, that a corporation chartered in one State and authorized by the law of another State to do business therein and to have there all the privileges of a domestic corporation, might, as a citizen of the latter State, bring a suit in the Federal courts against a citizen of the State of its incorporation.[43]

§ 557. National Banks.

When the present national banking system was established, and for more than twenty years afterwards, an express statute authorized the National Banks to sue and be sued in the Federal courts. Since 1887 it has been provided by law that for the purposes of the jurisdiction of the Federal courts National Banks are to be held to be citizens of the States in which they are respectively located, and the Federal courts have, in general, no other jurisdiction over controversies to which they are a party than they would have were such banks citizens of such States. [44]

§ 558. Federally Chartered Corporations.

It has been held that a corporation chartered by the United States, except as specifically restricted by Congress, has the right to invoke the jurisdiction of the Federal courts in respect to any litigation which it may have.[45]

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[39] 136 U. S. 356. See also Patch v. Wabash R. Co. (207 U. S. 277).

[40] Ohio & Miss. R. Co. v. Wheeler (1 Black, 286).

[41] Chapman v. Barney (129 U. S. 677); Great Southern Hotel Co. v. Jones (177 U. S. 449).

[42] 161 U. S. 545.

[43] See also Martin v. B. & O. Ry. (151 U. S. 673); Southern Pacific Ry. v. Denton (146 U. S. 202).

[44] 24 Stat. at L. 552.

[45] Osborn v. Bank of United States (9 Wh. 738); Pacific Railroad Removal Cases (115 U. S. 1).

§ 559. Fictitious Citizenship.

Federal jurisdiction may not be created by the fictitious assignment of the cause of action, but, where the transfer is real, and for a consideration, Federal jurisdiction will attach even though the transfer is shown to have been made with this end in view.[46]

In order that there may be Federal jurisdiction, mere diversity of residence is not sufficient. There must be diversity of citizenship, and this fact must affirmatively appear in the pleadings.[47]

§ 560. Nominal Parties.

Generally with regard to Federal jurisdiction based upon diversity of citizenship it may be said that the citizenship of purely nominal parties is disregarded, and that of the real parties in interest is held determinative.[48] But this rule does not apply to administrators, executors, trustees and others suing in a representative capacity. In their case, their citizenship is material.[49]

§ 561. Suits Between Aliens and American Citizens.

By Section 24 of the Judicial Code, the District Courts are given jurisdiction of cases in which the matter in controversy exceeds $3000 exclusive of interest and costs, and in which the parties are citizens of a State of the Union upon the one side and citizens or subjects of foreign States upon the other side. In these cases the residence of the alien parties is not material.[50] Stockholders of foreign corporations are conclusively presumed to be aliens, and thus foreign corporations are brought within the scope of Section 24 of the Judicial Code.[51]

§ 562. Suits Between Aliens.

When both parties to a suit are aliens the Federal courts have no jurisdiction except such as may be derived from the subject-matter involved.[52]

§ 563. Foreign States as Plaintiffs.

The right of a foreign State or of its sovereign to sue in the Federal courts is expressly recognized in the Constitution, and has been provided for in the Judicial Code.[53]

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[46] Dickerman v. Northern Trust Co. (176 U. S. 181).

[47] Wood v. Wagnon (2 Cr. 9); Wolfe v. Hartford Life Insurance Co. (148 U. S. 389).

[48] Browne v. Strode (5 Cr. 303).

[49] Coal Co. v. Blatchford (11 Wall. 172).

[50] Breedlove v. Nicolet (7 Peters, 413).

[51] Steamship Co. v. Tugman (106 U. S. 118).

[52] Montalet v. Murray (4 Cr. 46); Hodgson v. Bowerbank (5 Cr. 303).

[53] The Sapphire (11 Wall. 164).

§ 564. Suits between a State and Its Own Citizens.

The Supreme Court has refused to take original jurisdiction of a suit between a State and a citizen of another State, when, with the latter, it was necessary to join a citizen or citizens of the complainant State.[54]

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[54] Minnesota v. Northern Securities Co. (184 U. S. 199).

CHAPTER LXIII

THE LAW ADMINISTERED BY THE FEDERAL COURTS

In the chapters which have gone before consideration has been given to the organization and fields of jurisdiction of the Federal courts. We have now to consider the law which they apply.

In all cases, where applicable, as determined by the nature of the matters litigated, the Federal courts of course apply Federal statutes and treaties and the provisions of the Federal Constitution so far as they are self-executory. Also, and as will later be more specifically considered [1] the Federal courts apply those principles of International Law which the United States has expressly or by necessary implication accepted. As will also be shown, in suits in which the Federal jurisdiction is based upon the diversity of citizenship of the parties thereto, the Federal courts, in certain cases, have recognized the existence of, and by their decisions have developed, a body of general jurisprudential principles which do not necessarily correspond with the common-law principles of any of the States of the Union; and also, in suits between States of the Union, the Supreme Court has, from necessity, found itself compelled to develop a system of "interstate common law." [2]

The foregoing are instances of the faculty or power possessed by the Federal courts to build up, by their own decisions, systems of non-statutory or common law. However, the question which will be first considered is as to the power of Congress to provide the law to be applied by the Federal courts.

There is naturally no doubt as to the legislative power of Congress with regard to subjects which, by the Constitution, have been expressly, or by implication, placed within the control of the Federal Government. There is a question, however, as to the extent to which a Federal legislative power can be deduced from a simple grant of Federal judicial power.

§ 565. Procedural or Adjective Law.

That Congress has the power to provide the laws necessary for the establishment of the Federal courts, for endowing them with authority to regulate their own practice and procedure and to issue and enforce by contempt proceedings the writs and other orders required for exercising their jurisdiction and for maintaining their own dignity and order, there is no doubt. Indeed, certain of these powers have been held to be inherent in the courts, that is, necessarily possessed by them because of the fact that they are courts.[3] Nor is there any doubt as to the power of Congress to provide for and authorize the exercise of all executive and administrative means for the protection of the Federal courts and their justices,[4] and for the enforcement of their orders, decrees and judgments.

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[1] See § 579.

[2] See especially the case of Kansas v. Colorado (206 U. S. 46) in which the common law of the two States with reference to the matter in controversy was divergent.

§ 566. Substantive Law.

Turning now from adjective to substantive statute law it is to be noted that, in maritime and admiralty matters, the constitutional grant of judicial power has been held to carry with it a grant of legislative power to supply the law which is to be applied. This doctrine is elsewhere discussed in more detail, but it may be here pointed out that this doctrine is rested upon the ground that, because of its very nature, admiralty jurisdiction is wholly withdrawn from the States and that, therefore, the Federal jurisdiction, being exclusive, the legislative authority in the premises must necessarily be in Congress.[5]

As to whether or not it was the intention of the framers of the Constitution that Congress was to be regarded as constitutionally entitled to provide the law to be applied in cases in which the exercise of Federal judicial power rests upon the character of the parties thereto, and especially with reference to suits between citizens of different States of the Union, or between citizens of the United States and aliens, no clear light is thrown by the records which have been preserved of the debates in the Constitutional Convention or in the State ratifying conventions. In fact, however, Congress has never sought, with regard to such suits, to substitute its own enacted substantive laws for those of the States. By Section 34 of the original Judiciary Act, it provided that "the laws of the several States, except where the Constitution, treaties or statutes otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This provision has never been changed, and now constitutes Section 721 of the Revised Statutes. In the same act, as amended in 1792, it was provided that in equity and admiralty proceedings the modes of procedure in the Federal courts should be the customary ones, subject, however, to such changes as might be introduced by rules issued by the Supreme Court.

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[3] *Cf.* United States v. Hudson (7 Cr. 32).

How far it is constitutional for Congress to limit these powers or determine the manner in which they shall be exercised by the courts, is a question of some difficulty. By the Clayton Act of 1914 (38 Stat. at L. 738) it was mandatorily provided that a jury trial should be had in certain specified kinds of contempt. This provision was held unconstitutional in a lower Federal court in Michaelson v. United States, on the ground that the power of a court to vindicate or enforce its decrees in equity was inherent and indefeasible. The Supreme Court, however, held (266 U. S. 42) that the statutory provision had related only to criminal and not to civil contempts, and that it was proper for Congress to provide that criminal contempts should be in conformity with the practice in criminal cases. "If," said the court, "the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise."

[4] *In re* Neagle (135 U. S. 1).

[5] Providence and N. Y. S. S. Co. v. Hill Mfg. Co. (109 U. S. 578).

§ 567. Federal Courts and the Construction of State Laws.

By the Constitution the Federal courts are given jurisdiction of all suits between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In this grant of jurisdiction the determining factor is not the nature of the matter litigated or the law involved, but the character of the parties to the suits. No question of Federal concern, and no construction of a Federal law or constitutional provision need be involved. The subjects to be determined may, and, indeed, usually, in this class of cases, do depend wholly upon the interpretation and application of the laws of one or more of the States. The purpose in giving this jurisdiction is thus not the protection of Federal rights, privileges, and immunities, but the provision of tribunals presumably more impartial than would be State tribunals in suits between citizens of the State in which they are sitting and citizens of other States.

In short, the theory is that the Federal courts, when thus called upon by reason of the diversity of the citizenship of the parties to construe and apply State law, are to consider themselves as *ad hoc* agents of the State, and, therefore, under an obligation to apply that law as they find it. This obligation was recognized in the already quoted 34th section of the original Judiciary Act of 1789.

§ 568. Force of State Interpretations.

What the proper construction of the State law is, which they are to apply, the Supreme Court of the United States has repeatedly declared, is subject to the exceptions hereinafter to be described, to be determined by the interpretation that has been given to it by the State that has enacted it. In Elmendorf v. Taylor, Marshall said: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. . . . On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." [6]

§ 568a Exceptions to the Foregoing Rule.

It is to be observed that the rule stated in the preceding section would appear to be one not so much of imperative constitutional necessity, as it is one of comity adopted by the Federal courts from a proper sense of the respect due to the States whose law they are supposed to administer, and that, therefore, the provision of Section 721 of the Revised Statutes states a purely statutory and not a constitutional requirement.

§ 569. Equity.

Even this statutory requirement, it is to be observed, is a limited one, its application being limited to trials at common law, the entire field of equity procedure thus being omitted from its control.

In the comparatively early case of Boyle v. Zacharie [6a] the Supreme Court said: " The acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States. The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction the courts of the United States are not governed by the State practice. . . . And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the State practice but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject of course to the provisions of the acts of Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe." [7]

It does not clearly appear from the cases just how far the Federal courts, when exercising their equity jurisdiction, are disposed to go in refusing to follow the substantive rules and law of the States. It is, however, quite clear that they take a very proper stand when they assert that their equity jurisdiction may not in any way be burdened by

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[6] 10 Wh. 152, see also, Shelby County v. Guy (11 Wh. 361); Polk's Lessee v. Wendell (5 Wh. 293).

[6a] 6 Pet. 635 and 6 Pet. 648, 658.

[7] *Cf.* Russell v. Southard (12 How. 139); Bein v. Heath (12 How. 168); Payne v. Hook (7 Wall. 425); Robinson v. Campbell (3 Wh. 212); United States v. Howland (4 Wh. 108); McConihay v. Wright (121 U. S. 201); Neves v. Scott (13 How. 268).

State law either by way of definition of what shall constitute equitable causes of action, or what procedure shall be followed or remedies applied. But in not a few cases the language, though for the most part *obiter*, is much broader than this, and indicates an apparent willingness to go beyond this and refuse to follow State law, even in statute form, with reference to substantive rights of law as distinguished from the rules of procedure and remedies.

It is of interest to note that Congress has not felt obligated by the constitutionally recognized distinction between law and equity to maintain unchanged the distinction between equitable and legal defences, for it has provided by statute that certain defences which formerly could be set up only in equity, may now be offered in actions at law.[8]

§ 570. Rules of Evidence.

Generally speaking, Congress may of course provide the rules of evidence to be adopted by the Federal courts, and itself establish, or empower the courts themselves to establish, the rules governing their procedure in the trial of cases, the preparing and printing of records, the perfecting of appeals, etc.[9]

Section 914 of the Revised Statutes provides that in the Federal courts in civil causes other than equity and admiralty, "the practice, pleadings and forms and modes of proceeding" shall conform "as near as may be" to the existing practice in the States in which they sit. There is thus left, even as to these causes, opportunity for variance of practice whether because of constitutional necessity, as for example with reference to jury trial, or because of statutory direction. Thus the rules with reference to the compulsory production of documentary evidence, the amendment of pleadings, etc., are fixed by Federal statute. So also, it is held that Federal judges are not bound by State rules with reference to instructing the jury, the granting of new trials, the submission of special issues to the jury, the preparation of a case for appeal, etc.

So far is the foregoing doctrine carried, that the Supreme Court has held that it will set aside a decision of a Federal court, interpreting a State statute, which conflicts with an interpretation subsequently given to the statute by the highest court of the State.[10]

§ 571. Unsettled Construction of State Law.

In Green v. Neal [11] it was held that where a State court had changed its former construction of a law, the Federal courts, upon a subsequent case coming before them, should do likewise and thus keep ever in accord with the latest decisions of the State courts. "The same reason," the opinion declared, "which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction." The court, however, added: "A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule." And in Leffingwell v. Warren [12] the court said: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text (citing numerous cases). If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications." Here again it will be observed that the court was careful to say, not that it would always follow the latest construction of the State courts but the "latest settled adjudications."

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[8] 38 Stat. at L. 956.

[9] See Potter v. National Bank (102 U. S. 163).

[10] Sioux County v. National Surety Co. (276 U. S. 238). Citing Hines Yellow Pine Trustees v. Martin (268 U. S. 458) and Bauserman v. Blunt (147 U. S. 167).

[11] 6 Pet. 291, 298.

It would appear, however, that though in general the Federal courts when called upon to apply State laws will follow the last interpretation given to them by the respective State courts, this will not necessarily be done where a change of construction by the State courts has been a recent one, and not supported by such a line of decisions as to have become, to use the language of the opinion in Shelby Co. v. Guy,[13] "a fixed and received construction," and especially where the earlier construction is one that for a considerable period of time has been the uniformly accepted one in the State courts.

As will later appear,[14] the Supreme Court has held quite firmly to the doctrine that the construction by the State courts of the law relating to real property is to be followed by the Federal courts, but in Kuhn v. Fairmont Coal Co.,[15] the court held that this should be the practice only where the State determinations have become established rules of property and action prior to the accruing of the rights of the parties litigant. In this case prior adjudications were reviewed and explained, the language employed in East Central Eureka Min. Co. v. Central Eureka Min. Co.[16] and Brine v. Hartford Fire Ins. Co.[17] being especially defined and restrained.[18]

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[12] 2 Black, 599.

[13] 11 Wh. 361.

[14] Section 837.

[15] 215 U. S. 349.

[16] 204 U. S. 266.

[17] 96 U. S. 627.

[18] The following are given in Kuhn v. Fairmont Coal Co. (215 U. S. 349, 360) as rules that are "no longer to be questioned."

"1. When administering State laws and determining rights accruing under those

§ 572. The Obligation of Contracts and the Construction of State Law.

In an earlier chapter has been considered the circumstances under which the Federal courts refuse to be bound by the construction given to State law by the State courts when the impairment of the obligation of contracts is involved.[19]

§ 573. Federal Courts and the Common Law.

The general principle may be stated that there is no Federal common law—that, in other words, the law which the Federal courts apply consists wholly and exclusively of the Federal Constitution, treaties, the statutes of Congress, and the laws common and statutory of the several States of the Union.

The common law of the States consists of the principles of the English common law, developed and modified by American custom and judicial precedent. Having this great common substratum of the English common-law principles, the non-statutory law of the several States is, in very many respects, the same throughout the United States. But, in other respects, statutory enactment and divergent customs and judicial determinations have led to important differences.

In general, however, except where statutes have expressly amended the English common law as it was at the time of the separation from England, or where clear judicial *dicta* to the contrary are to be found, the general doctrines of the English common law are held to be in force.[20]

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laws, the jurisdiction of the Federal courts is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the State courts.

"2. Where, before the rights of the parties accrued, certain rules relating to real estates have been so established by State decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State.

"3. But where the law of the State has not been thus settled, it is not only the right, but the duty, of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence.

"4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the State court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the State applicable to the case, even where a different view has been expressed by the State court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the State court if the question is balanced with doubt."

See, for a later case, Hines Yellow Pine Trustees v. Martin (268 U. S. 458).

[19] Chapter LIX.

[20] Louisiana, whose law is founded on the Roman civil law, is an exception to this, but statute and judicial practice have brought the Louisiana law a long way toward conformity to the common law.

Strictly applying the doctrine that the Federal courts, when exercising jurisdiction derived from the character of the parties to the causes tried, will apply the laws of the Stated applicable thereto, there is left no opportunity for the creation of a true Federal common law outside of and independent of the Federal Constitution and the treaties entered into and the laws passed in pursuance thereof.

That the Federal courts have no jurisdiction derived directly from the common law has been unquestioned since the early case of *Ex parte* Bollman.[21]

That the Federal courts not only have no common-law jurisdiction, but that, generally speaking, there is no Federal common law as distinguishable from statute law (Constitution, treaties, acts of Congress) was declared in the comparatively early case of Wheaton v. Peters.[22]

§ 574. Interstate Commerce and Common Law.

This general doctrine that there is no Federal common law requires considerable explanation, if not qualification. In the first place, with reference to those matters of which interstate commerce is the most important example, general common-law principles are held, in the absence of express legislative provision to the contrary, to apply.

In Western Union Telegraph Co. v. Call Publishing Co.,[2] reaffirming the doctrines of previous cases with reference to the subject of interstate commerce, the court said:

"There is no body of Federal common law separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. . . . We are clearly of opinion . . . that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

The principle here stated with reference to the subject of interstate commerce would seem to be applicable with reference to all other matters falling within the control of the Federal Government.

§ 575. General Principles of the Common Law as Distinguished from Their Special and Local Applications.

In Olcott v. The Supervisors [24] the court, said: "It must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments."

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[21] 4 Cr. 75.

[22] 8 Pet. 591.

[23] 181 U. S. 92, 101.

[24] 16 Wall. 678.

§ 576. General Commercial Law: Swift v. Tyson.

The doctrine that, when the question is not one of peculiarly local law and local interest, the Federal courts will determine for themselves, without reference to the decisions of local courts, what the law is, even though it be with reference to subjects exclusively within the legislative control of the States, and over which the Federal courts obtain jurisdictional power only by reason of the citizenship of the parties litigant, has received especial application in the field of commercial law.

This principle with reference to commercial law was first laid down by the Supreme Court in the case of Swift v. Tyson.[25]

The doctrine declared in Swift v. Tyson has continued to guide the Supreme Court. Under its operation it has come about that in many cases it depends upon whether suit is brought in a Federal or a State court, as to what law will be held applicable to the matter in dispute.[26]

An extreme instance in which, in construing the common law, the Supreme Court refused to follow the determination of the State courts is exhibited in the recent case of Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.[27] In this case the Supreme Court refused to follow the decision of a State court holding invalid as against public policy a contract whereby a railroad company had granted exclusive privileges at its station to a certain transfer company. Here, it is to be observed, the Supreme Court appears to have held that the right which it has reserved to itself to determine for itself, and uncontrolled by State decisions, what is the common law, relates not merely to questions of general commercial law, but to the common law in general, except, apparently, as to cases in which titles to land or fixed or ancient local usages are involved, for we find the court saying: "There is no question concerning title to land. No provision of State statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. . . . The applicable rule sustained by many decisions of this court is that in determining questions of general law, the Federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment." [28]

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[25] 16 Pet. 1.

[26] See, for example, Brooklyn City, etc., Ry. Co. v. National Bank (102 U. S. 14); Smith v. Alabama (124 U. S. 465).

[27] 276 U. S. 518, 529.

§ 577. Summary.

Summing up the discussion of the topic of the Federal courts and State laws, it is apparent that in a number of directions the Federal courts, while deriving jurisdiction from the nature of the parties but presumably applying State law, have in fact built up for themselves a considerable body of law which is neither laid down in the Federal Constitution, treaties, and laws of Congress nor in conformity with the laws of the States as determined by their respective judicial tribunals.

Whether this body of law may properly be termed Federal common law may possibly be questioned. It is unquestionably Federal in the sense that it owes its authority to, and is applied by, the Federal courts and it is common in that it may be enforced by the Federal courts throughout the Union. There is, however, good reason for holding that it is essentially State law. The fact that it differs from the law as laid down by the State courts is due to the peculiar circumstance that, under our judicial system, two co-ordinate sets of courts have the power to interpret and determine the common law of the several States. In other words, the Federal courts have taken the position that, when sitting for the enforcement of State laws, they do not sit as tribunals subordinate to the State courts, but as tribunals co-ordinate with them; and that, therefore, they have an independent right to determine what is the non-statutory law of the State, using for that purpose the same sources of information that the State courts use in determining for themselves the same laws.

§ 578. Comity between the Lower Federal Courts.

There is no obligation upon the part of one of the lower Federal courts to follow the doctrines previously declared by other lower Federal courts, and, in fact, there have been numerous instances in which these courts have, in different cases, asserted inconsistent and even directly contradictory doctrines of law. This diversity of Federal judicial opinion has necessarily persisted until the Supreme Court has found a proper opportunity, in a case coming before it, to declare what shall be, for the future, the true doctrine.

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[28] The cases cited as instances in which the Supreme Court had decided for itself questions of general law, were: Swift v. Tyson (16 Pet. 1) (involving a bill of exchange); Carpenter v. Providence Washington Ins. Co. (16 Pet. 495) (construction of an insurance policy); Lane v. Vick (3 How. 464) (construction of a will); Foxcroft v. Mallett (4 How. 353) (construction of a deed); Chicago v. Robbins (2 Black, 418) (what constitutes negligence); Yates v. Milwaukee (10 Wall. 497) (what constitutes a dedication of land to a public use); Olcott v. Fond du Lac County (16 Wall. 678) (what public purpose warrants a municipal tax); N. Y. C. R. Co. v. Lockwood (17 Wall. 357) (liability of common carriers for injury to passengers); Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (129 U. S. 397) (validity of a contract for the carriage of goods); B. & O. R. Co. v. Baugh (149 U. S. 368) (responsibility of a railway to its employees for personal injuries); Beutler v. Grand Trunk Junction R. Co. (224 U. S. 85) (who are fellow servants).

That such a diversity of Federal judicial opinion is to be regretted, all will admit, but it is now in large measure prevented by the lower courts requesting from the Supreme Court its judgment upon disputed doctrines of law, or by the action of that court, *ex proprio motu*, requiring that the points be certified to it for determination.

§ 579. Federal Courts and International Law.

In so far as applicable, American courts apply established doctrines of international law. Not, however, in the sense that they apply a body of law which has not been derived from and based upon the sovereign will of the American State, but upon the theory that this body of rules is first impliedly adopted by the State and thus made a portion of its own municipal law. Resting thus upon the implied assent and adoption of the United States, these principles of international law are subject to express modification by statute. In the very early case of The Charming Betsy [29] decided in 1804, it seems to have been accepted as a principle not needing argument that the court would be bound by an act of Congress providing a rule different from that laid down by international law, the only observation made being that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." In The Nereide,[30] Marshall again declared: " Till an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land."

Where principles of international law are applicable they do not need to be proved as in the case of foreign municipal laws, but may be taken judicial cognizance of by the courts. That is, they may, if not already known to the court, be ascertained by the court by its own study of the proper sources of information.[31]

§ 580. Federal Criminal Law.

There is no common, non-statutory, Federal criminal law. The Federal courts have no criminal jurisdiction save that given them by statute of Congress; and no act is recognized as a crime against the peace of the United States except as it has been declared such by act of Congress;

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[29] 2 Cr. 64.

[30] 9 Cr. 388. See also Hilton v. Guyot (159 U. S. 113); The Lottawanna (Rodd v. Heartt) (21 Wall. 558); The Paquete Habana (175 U. S. 677).

[31] The Scotia (14 Wall. 170).

and Congress has of course no constitutional power to create crimes and affix penalties to their commission, except as to subjects or in places which the Constitution places under Federal control. Thus, as a means of compelling obedience to the laws which Congress is constitutionally empowered to enact, it may attach penalties to their violation.

But, though the Federal courts have no common-law Federal jurisdiction, and though there is no common, non-statutory criminal law for them to administer, they may, and indeed have been authorized by statute to, adopt common-law remedies and punishments where Congress has not otherwise provided.[32]

In Tennessee v. Davis,[33] a case removed from the State into the Federal court under Section 643 of the Revised Statutes, it was argued that no mode of procedure in trial of the criminal offence charged had been prescribed by act of Congress. The court, however, said: "While it is true there is neither in Section 643 nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered, the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case."

Because there are no Federal common-law crimes it results that all Federal indictments must charge the accused with the violation of some specific statute or statutes of Congress.

As to the extent of the power of Congress to create statutory crimes it may be said, generally, that, aside from specific offences, such as piracy and felonies on the high seas, offences against the law of nations, counterfeiting the securities and current coin of the United States, etc., which are specifically placed by the Constitution under Federal authority, there is the implied power of Congress to provide for the enforcement by criminal proceedings, if deemed just and expedient, of any law which it has the constitutional competence to enact, and for the protection of every Federal right, privilege and immunity, whether of the individual or of the government, and whether expressly provided for in the Constitution, or implied in the polity of that instrument.

The constitutional requirements with reference to the manner in which the Federal criminal jurisdiction is to be exercised, are elsewhere considered.[34]

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[32] Thus, see Rev. Stat, § 722.

[33] 100 U. S. 257.

§ 581. Federal Criminal Law in State Courts.

It will be remembered that Congress has not seen fit in all cases to vest the exercise of the entire extent of the Federal judicial power exclusively in the Federal courts. The constitutionality of thus leaving in the State courts jurisdiction that might be vested exclusively in the Federal courts, or of allowing both systems of courts to exercise concurrent jurisdiction as to civil matters has not been seriously questioned by the courts.

As to criminal cases the original Judiciary Act provided that the Federal District and Circuit Courts should have jurisdiction, "exclusively of the courts of the several States" over all crimes and offences "cognizable under the authority of the United States." It was not long, however, before Congress so legislated as to permit the State courts to take jurisdiction of certain special cases of a criminal nature, as, for example, in certain cases with respect to fines, forfeitures and penalties under the License Tax on Wines and Spirits Act of 1794, the act to Establish Trading Houses with the Indian Tribes of 1796, and the Paper Stamp Tax Act of 1797.[35] The vesting of jurisdiction in the State courts to try Federal criminal offences was still more explicitly provided for in the act of 1799 for establishing the Post Office,[36] which provided that the jurisdiction of the State courts might extend not only to matters of fines, forfeitures, etc., under the act, but also to such serious offences as robbery of the mails.[37]

As to the constitutional inability of the Federal Government to compel the governmental agencies of the States to aid actively, through their officials, in the enforcement of Federal criminal statutes, there would seem to be no question, but that they may be permitted to do so, would seem to have been made plain by the Supreme Court in Tennessee v. Davis,[38] decided in 1880, when, speaking through Justice Strong, it was declared that there were no inherent difficulties in the way of the trial in the Federal courts of indictments for alleged offences against the peace and dignity of the States, provided, of course, there were present other facts which would justify the exercise of the Federal jurisdiction. By a parity of reasoning, it would seem to follow that the State courts, having general jurisdiction under the laws of their States, may be permitted to take cognizance of, and enforce, Federal laws, the only difference being that, whereas the Federal Government may compel the exercise of the jurisdiction by the Federal courts, and even against the resistance of the State courts, it may only authorize, but not compel, the exercise of jurisdiction by the State courts.

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[34] See Chapter LV.

[35] See the excellent article of Charles Warren, entitled "Federal Criminal Laws and State Courts" in XXXVIII *Harvard Law Review*, 545.

[36] 28 Stat. at L. 733.

[37] For further historical data with regard to the vesting in the State courts of jurisdiction to try offences against the United States, see the article by Charles Warren earlier referred to.

[38] 100 U. S. 257.

The fact remains, however, that there is as yet no clear holding that Congress may authorize the State courts to lend their aid in the enforcement of Federal criminal law, and no such holding can be had so long as Section 256 of the Judicial Code remains unamended which declares that the jurisdiction vested in the courts of the United States "shall be exclusive of the courts of the several States," in "cases and proceedings" of "all crimes and offences cognizable under the authority of the United States," and of "all suits for penalties and forfeitures incurred under the laws of the United States." [39]

§ 582. General Consideration of the Enforcement of Federal Laws by State Courts.

It is clear that State courts must look to the Constitution and laws of their own States as the source of their jurisdictional powers. As regards, however, the substantive law which they are to apply in the exercise of their jurisdictional powers, they are required to look not only to the Constitution and laws (statutory and common) of their State, but to the Federal laws as well, when these are applicable in the causes which come before them, and, indeed, are obligated to enforce these laws in preference to those of their own States when there is a conflict between the two.[40]

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[39] It may, however, be observed that, by Section 1014 of the Revised Statutes, State magistrates are permitted to arrest upon warrant or admit to bail for trial before the Federal courts persons charged with offences against the United States. The Volstead Act (41 Stat. at L. 207) Section 2, makes applicable this Section 1014 of the Revised Statutes. Generally on the enforcement of the Volstead Act through State agencies, see the article by J. R. Chamberlain in 10 *American Bar Association Journal*, 391.

[40] See especially Mondou v. N. Y. N. H. & Hartford R. Co. (223 U. S. 1).

Of course, the State courts, if convinced that the Federal laws are unconstitutional, may refuse to recognize their validity, in which case the question as to this is finally determined by appeal, or certiorari, by the Federal Supreme Court.

CHAPTER LXIV

POLITICAL QUESTIONS [1]

§ 583. Political Questions.

Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass judgment upon the policy of legislative or executive action. Where, therefore, discretionary powers are granted by the Constitution or by statute, the manner in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the existence and extent of these discretionary powers.

As distinguished from the judicial, the legislative and executive departments are spoken of as the political departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy. These considerations of public or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute, but, within these limits, they do permit the departments, separately or together, to recognize that a certain set of facts exists or that a given status exists, and these determinations, together with the consequences that flow therefrom, may not be traversed in the courts.

In the exercise of his political powers, not only the President but those acting under his order, are exempt from judicial control.[2]

No comprehensive enumeration of these political determinations has been attempted by the courts, nor, indeed, is such an enumeration possible. Specifically, however, the following have been decided to be political and, therefore, not justiciable questions.

The existence and territorial extent of the sovereignty of a State, including the question as to the *de jure* character of a government is a political question.[3]

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[1] Questions closely connected with those discussed in this chapter are considered by the author in his *Fundamental Concepts of Public Law*, especially in Chapters XVIII, XX, XXI, XXII, and XXV. For an excellent discussion of political questions as defined by American courts see the article by Professor Oliver P. Field "The Doctrine of Political Questions in Federal Courts" in 8 *Minnesota Law Review*, 485. See also article by Professor P. B. Potter, "The Political Question in International Law in the Courts of the United States" in 8 *Southwestern Political and Social Science Quarterly*, 127.

[2] Marbury v. Madison (1 Cr. 137). Generally, as to political questions, see Cherokee Indians v. Georgia (5 Pet. 1); Georgia v. Stanton (6 Wall. 50).

The existence of the status of defence, or of war, or of belligerency is a political question.[4]

Of course the courts of one country are not bound by the decisions of another country as to the territorial extent of jurisdiction of that country, or indeed as to any question of international law and right.[5]

Whether or not a treaty or other international agreement which the United States may have entered into with a foreign country has been sufficiently ratified by that country is for the political departments of our government to determine, as is also the continuing existence of a treaty.[6]

Whether or not a given person is to be recognized as the accredited agent, consular or diplomatic, of a foreign government, is also, a question for final determination by the political department.[7]

§ 584. Foreign Relations: Acts of Foreign Governments.

In Oetjen v. Central Leather Co.[8] the court, after reviewing political conditions in Mexico, said: "This court will take judicial notice of the fact that since the transactions thus detailed and since the trial of this case in the lower courts, the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917." [9] And, later in the same opinion: "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." [10]

The court also pointed out that it was established that when a government which originates in revolution or revolt is recognized by the political department of the United States Government as the *de jure* government of the country in which it is established, the recognition is retroactive in its effect and validates all the acts of the government so recognized from the time of the beginning of its existence.[11] The court also quoted with approval the following from the opinion of the court in Underhill v. Hernandez: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers as between themselves." [12]

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[3] Foster v. Neilson (2 Pet. 253); Wilson v. Shaw (204 U. S. 24); *Ex parte* Cooper (143 U. S. 472); Jones v. United States (137 U. S. 202); Williams v. Suffolk Ins. Co., (13 Pet. 415).

[4] United States v. Palmer (3 Wh. 610); The Divina Pastora (4 Wh. 52); The Santissima Trinidad (7 Wh. 283); Kennett v. Chambers (14 How. 38).

[5] Rose v. Himely (4 Cr. 241).

[6] Doe v. Braden (16 How. 635); Terlinden v. Ames (184 U. S. 270); Wilson v. Shaw (204 U. S. 24).

[7] *Ex parte* Baiz (135 U. S. 403).

[8] 246 U. S. 297, 301.

[9] Citing Jones v. United States (137 U. S. 202), and Underhill v. Hernandez (168 U. S. 250).

[10] Citing United States v. Palmer (3 Wh. 610); Foster v. Neilson (2 Pet. 253); Garcia v. Lee (12 Pet. 511); Williams v. Suffolk Ins. Co. (13 Pet. 415); and *In re* Cooper (143 U. S. 472).

§ 585. De Jure Character of Governments of the States of the Union. In Luther v. Borden [13] it was held that the judiciary was not competent to question the decision of the political departments of the National Government as to which of two contesting organizations is the *de jure* government of a State of the Union. *A fortiori* it was held that it was not competent for State courts to question the *de jure* character of the government from which they derived their standing as courts.

Other cases in which it has been questioned in the Supreme Court whether, in specific instances, the Governments of States of the Union were republican in character, as required by the Federal Constitution, are elsewhere discussed. It may be said here, however, that it has been held that the enforcement of this constitutional requirement depends "upon political and governmental action through powers conferred upon the Congress of the United States." [14]

In Commonwealth of Massachusetts v. Mellon [15] it was contended that an act of Congress which had authorized appropriations from the Federal treasury for certain purposes by the States provided they made similar appropriations from their treasuries, should be declared unconstitutional in that thus a matter of local State concern was drawn under Federal control. The court gave various reasons for holding that the case was not a justiciable one, and, among them, was the following: "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power."

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[11] Citing Williams v. Bruffy (96 U. S. 176); Underhill v. Hernandez (168 U. S. 250).

[12] Citing also American Banana Co. v. United Fruit Co. (213 U. S. 347).

[13] 7 How. 1.

[14] Marshall v. Dye (231 U. S. 250). See also Pacific States Tel. & Tel. Co. v. Oregon (223 U. S. 118).

[15] 262 U. S. 447.

§ 586. Other Political Questions.

The extent of the immunity from judicial control of matters of international concern is well illustrated in the case of United States *ex rel.* Boynton v. Blaine,[16] decided in 1890, in which the general doctrine was reviewed and affirmed that mandamus will not issue to control the executive department with reference to claims prosecuted by it against foreign governments in behalf of private persons. In this case a mandamus was sought to compel the Secretary of State to pay over to the petitioner certain sums of money paid to the United States by Mexico under an award made in his favor under a convention that had been entered into between the United States and Mexico. The Secretary of State, acting under the direction of the President, was withholding the payment to the petitioner pending an investigation of fraud. The court held that the matter was still pending before the department, that the principle of *res adjudicata* could not be invoked against the United States by the individual claimants, and that the judicial department could not intervene.

In Martin v. Mott [17] it was held that the courts could not question the correctness of the decision of the President, acting under the authority of a law enacted February 28, 1795, as to the necessity for calling out the militia to repel an invasion or suppress an insurrection.

In Neely v. Henkel [18] the court held that it was not competent for the judiciary to make any declaration as to the length of time Cuba should be occupied and controlled by the military forces of the United States, "it being," said the court, "the function of the political branch of the government to determine when such occupation and control shall cease, and, therefore, when the troops of the United States shall be withdrawn from Cuba."

In United States v. Holliday [19] the existence of tribal relations among Indians was declared to be a matter for political determination.

§ 587. Suits Between the States.

Though questions of the extent of political jurisdiction are, as has been seen, essentially political in character, they are, as between the individual States of the Union, justiciable in the Supreme Court. This, however, is due to the express provision of the Constitution giving to that court original jurisdiction over "controversies between two or more States." This precise question is more particularly discussed in a later chapter dealing with suits between States.

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[16] 139 U. S. 306.

[17] 12 Wh. 19.

[18] 180 U. S. 109.

[19] 3 Wall. 407.

§ 588. Courts Will Exercise Jurisdiction when Private Rights Are Involved.

In all the foregoing cases the courts held themselves bound by the positions assumed by the executive and legislative departments. When, however, private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.

Thus, as has been set forth in another chapter, treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the court will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar.[20]

§ 589. Courts Will Not Perform Administrative Functions.

From the foregoing it appears that the courts themselves decline to assume jurisdiction with reference to matters of a political character. So also, they have held that it is beyond the constitutional power of Congress to impose upon them the performance of duties essentially administrative in nature. The instances in which the lower Federal courts have refused to perform administrative functions are considered in another chapter.[21] So also, it has been held that these courts sitting as equity tribunals may exercise only those powers of English courts of chancery which were judicial in character, and not those exercised by the chancellor as the representative of the King and by virtue of the King's prerogative as *parens patriæ*.[22]

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[20] *Ex parte* Cooper (143 U. S. 472); La Ninfa (75 Fed. Rep. 513).

[21] Chapter LXXV, The Separation of Powers.

[22] Fontain v. Ravenel (17 How. 369).

CHAPTER LXV

ADMIRALTY AND MARITIME JURISDICTION

§ 590. Admiralty and Maritime Defined.

The Federal judicial power is, by Article III, Clause 1, expressly declared to extend to "all cases of admiralty and maritime jurisdiction."

These two terms "admiralty" and "maritime," though largely overlapping in their application, are not wholly synonymous. In England "maritime" had reference primarily to causes of action arising upon the high seas and governed by what was known as general maritime law, that is, the general practice of nations. "Admiralty," upon the other hand, had, in England, primary reference to causes of a local nature, and governed by local maritime law, such as, for example, police measures relating to shipping and harbors, fishing regulations, etc. However, the jurisdiction of both admiralty and maritime causes, as thus distinguished, was, by the English law, vested in the courts of the Admiral of the English Navy.[1] There is, therefore, some justification for the statement that, at the time the Constitution was adopted, "maritime" had reference to the character of the causes, and "admiralty" had reference to the tribunals in which they were tried.

Since the Constitution uses the terms without defining them, their scope, it might appear, should be determined by the meanings attached to them at the time of the adoption of the Constitution by British practice. In fact, however, this was done by the American courts in their early decisions to only a limited extent. The chief reason for this was that, in England, there had been a long and jealous struggle for jurisdiction between the admiralty and the common-law courts with the result that the jurisdiction of the admiralty courts had been very greatly restricted. These restrictions upon admiralty jurisdiction, in so far as they excluded from it causes essentially maritime in character, the United States Federal courts did not feel themselves obligated to accept and thus we find Justice Washington, in Davis and Brooks v. Seneca,[2] saying that the extent of the judicial power of the United States with reference to admiralty and maritime cases was not to be determined by that of the admiralty court in England, but by the recognized principles of maritime law as "respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe."

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[1] The Admiral's jurisdiction, indeed, extended at one time to causes that were not maritime at all, inasmuch as it embraced all cases arising "beyond the seas," that is, beyond the seas surrounding the British Isles. On the other hand, it is to be noted that some causes, essentially maritime in character, were cognizable by other than courts of admiralty.

[2] Fed. Cas. No. 12,670.

This doctrine was declared in a long series of cases, and found final statement by the Supreme Court in New Jersey Steam Navigation Co. v. Bank.[3]

Since the beginning, then, the admiralty and maritime jurisdiction of the United States has been of a double nature: that over cases depending upon acts committed upon the seas; and that over contracts, and other transactions connected with the sea. In the former class of cases, the jurisdiction is given by the locality of the act; in the latter class, by the character of the act or transaction.

The cases falling within the Federal admiralty jurisdiction because of the locality, i. e., founded upon acts committed upon the high seas and other navigable waters, are, broadly speaking, of two classes; those of prize, arising *jure belli;* and those acts, torts, injuries, etc., which have no reference to a state of war.

Those cases which fall within the admiralty jurisdiction purely because of their maritime nature are those arising out of contracts, claims, etc., with reference to maritime operations. In actions of tort the test determining jurisdiction is locality; in contracts, it is the subject-matter.[4]

This jurisdiction has been exclusive in the Federal courts, though common-law remedies are available to suitors where the common law is competent to give it.[5]

§ 591. Spatial Extent of Admiralty Jurisdiction.

There was at first a disposition upon the part of the Supreme Court to give to the Federal courts a narrow admiralty jurisdiction, spacially considered, corresponding with that then exercised by the English court, but, moved especially by the arguments of Justice Story, a much wider sphere of admiralty power was later upheld.

According to the earlier decisions, the Federal admiralty jurisidiction was confined to cases arising upon the high seas and upon rivers as far as the ebb and flow of the tide extended, in this respect following substantially the English doctrine. However, in Waring v. Clarke,[6] it was definitely stated that, in determining this matter of jurisdiction, as constitutionally provided for, the American courts would not feel themselves obliged to follow the English practice.[7] The way was thus prepared for the decision of the court in The Genesee Chief,[8] which, expressly overruling the earlier cases, declared that the Federal admiralty jurisdiction extends over all public navigable waters upon which commerce is carried on between different States or with foreign nations.[9]

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[3] 6 How. 344.

[4] Waring v. Clarke (5 How. 441); New Jersey Steam Navigation Co. v. Merchants' Bank (6 How. 344).

[5] Judiciary Act of 1789, Section 9.

[6] 5 How. 441.

The limitation of admiralty jurisdiction to tidal waters being abandoned, the further extension of the jurisdiction to all the great navigable waters within the United States soon followed.[10]

§ 592. Admiralty Jurisdiction Extends to Navigable Waters Wholly within a State.

The Federal admiralty jurisdiction, being wholly independent of the power to regulate interstate commerce, and attaching whenever the cause of action has arisen on navigable water, jurisdiction extends over all cases arising upon navigable waters even though they be wholly within the confines of a particular State, provided they constitute connecting links in chains of commercial communication between States. In The Daniel Ball [11] the court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

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[7] The reasons for this conclusion were stated at length by the court in its opinion in this case.

[8] 12 How. 443.

[9] The case of The Genesee Chief arose under, and, therefore, involved the constitutionality of, the act of Congress of 1845 extending the jurisdiction of the Federal District Courts to certain cases arising upon the great lakes and upon the navigable waters connecting them.

Congress has never attempted to extend the admiralty jurisdiction of the Federal courts beyond "Navigable waters of the United States," and these, as later declared in the cases of The Daniel Ball (10 Wall. 557), in contradistinction to the navigable waters of the States, are those which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes by which such commerce is conducted by water."

[10] The Magnolia (20 How. 296).

[11] 10 Wall. 557.

In The Montello [12] the same principle was applied to the Fox river of Wisconsin, although its navigability was interrupted by rapids and falls around which portages had to be made.

Federal admiralty jurisdiction is not affected by the fact that at the time of the accruing of the cause of action the vessel or vessels concerned are upon a voyage between ports of the same State.[13]

§ 593. Definition of Public Navigable Waters.

In The Daniel Ball and The Montello cases the court was called upon to determine what were navigable waters of the United States within the definition of the term as used in acts of Congress. Inasmuch as the Federal admiralty jurisdiction is distinct from the commerce power, and inasmuch as navigability has been accepted as the test of admiralty jurisdiction, there might appear to be no constitutional difficulty in the way of a provision by Congress further extending the Federal admiralty jurisdiction over navigable waters located wholly within a State and not constituting links in a continued highway over which commerce is or may be carried on with other States or foreign countries. As to this, however, it is to be observed that the practical reasons stated by Chief Justice Taney in justification of including within the admiralty jurisdiction navigable waters which are highways, or links of highways in interstate and foreign commerce, would not apply. This fact, the Supreme Court might find sufficient to render constitutionally unjustifiable an attempted extension by Congress of the admiralty jurisdiction to waters which, though navigable, would not meet this test.

§ 594. Extent of Federal Control of Navigable Waters: Recent Cases.

The extent of the Federal control over navigable waters is more fully considered in connection with the discussion of the commerce powers of the National Government. It will, however, be appropriate here to refer to a few of the more recent cases.

It is established that, as an incident to the improvement of the navigability of streams, Congress may create and use or lease water power. Thus, in United States v. Chandler-Dunbar Water Power Co.,[14] after pointing out that the judgment of Congress as to whether a construction in or over a stream is an obstruction to its navigation and what works are required for increasing its navigability is conclusive, the court went on to say with regard to the claim that, under the circumstances of the instant case, the works which the Government had provided for resulted in the conservation of the water flow and thus in the provision of water power which it was proposed to use for commercial purposes, and that this amounted to a taking of private property for commercial uses and not for the improvement of navigation: "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of Government. The practice is not unusual in respect to similar public works constructed by State governments." [15]

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[12] 20 Wall. 430.

[13] The Belfast (7 Wall. 624), overruling previous cases as to this. For an argument that the Federal admiralty jurisdiction should not be construed to extend to contracts for the repairs of vessels engaged wholly in commerce within a State, see the dissenting opinion of Justice Brewer in The Robert W. Parsons (191 U. S. 17).

[14] 229 U. S. 53.

In Economy Light & Power Co. v. United States [16] the court said: "We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the States is within the power of Congress to preserve for future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. . . .

". . . Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of Federal control to make them again important avenues of commerce among the States. If they are to be abandoned, it is for Congress, not the courts, so to declare." [17]

In United States v. Holt State Bank [18] it was declared that the navigability or non-navigability of a stream is to be determined not according to any rule prevailing in a State but according to general rules recognized and applied in the Federal courts. In this case it was also declared that lands underlying navigable waters within a State, though belonging to the State in its sovereign capacity, are subject to the paramount power of Congress to control for purposes of navigation, and also to any rights which, before the creation of the State, the United States may have granted by way of performing international obligations or of carrying out any other public purposes.

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[15] Citing Kaukauna Water Power Co. v. Green Bay and M. Canal Co. (142 U. S. 254). As to excess condemnations of lands see the recent case of City of Cincinnati v. Vester (50 Sup. Ct. Reporter, 360).

[16] 256 U. S. 113, 123.

[17] See also New Jersey v. Sargent (269 U. S. 328); and United States v. Holt State Bank (270 U. S. 49).

[18] 270 U. S. 49.

§ 595. Canals.

In later cases the admiralty jurisdiction of the United States has been construed to extend to cases arising on canals.[19]

In the first of the cited cases it was held that the canals are navigable waters within the meaning of admiralty law; in the second that canal-boats are ships or vessels within the meaning of the same law.

§ 596. Dry Docks.

It has been held that repairs made to, or injuries sustained by, a ship while in dry dock are maritime in character, and that this is so even when all water has been removed from the dry dock.[20] However, a dry dock itself, not being used for purposes of navigation, is not a subject of salvage service or of admiralty jurisdiction.[21] It would appear, however, that a dry dock habitually moved from port to port would be subject to admiralty jurisdiction. In the Cope case, referred to in the footnote, the dock was intended to be permanently moored but had accidentally broken loose.

§ 597. Admiralty Jurisdiction Does Not Carry with it General Political Jurisdiction over Navigable Waters.

It has been held in an unbroken line of cases that the grant to the United States of admiralty jurisdiction does not, in itself, carry with it any general or political jurisdiction. That is to say, unless Congress has expressly so legislated, the State courts still have exclusive cognizance of crimes committed upon their navigable waters, and upon the sea within a marine league of the shore. In the leading case of United States v. Bevans,[22] Marshall pointed out that the delegation to the Federal judiciary carries with it, indeed, a legislative power to render that jurisdiction effective, but it does not operate to take the navigable and territorial waters of a State from without the general jurisdiction of the State in the manner that districts purchased by the Federal Government, with the consent of the legislature of a State, for the erection of forts, arsenals, etc., are so removed.[23]

§ 598. Admiralty Courts.

During the colonial period admiralty jurisdiction in this country was exercised by vice-admiralty courts created by commissions from the

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[19] *Ex parte* Boyer (109 U. S. 629); and Perry v. Haines, *sub nom.* The Robert W. Parsons (191 U. S. 17).

[20] Simmons v. The Jefferson (215 U. S. 130).

[21] Cope v. Vallette Dry Dock Co. (119 U. S. 625).

[22] 3 Wh. 336.

[23] For a later affirmance of this doctrine, see Manchester v. Massachusetts (139 U. S. 240).

British High Court of Admiralty, authority being given to the colonial authorities by their charters to establish these tribunals. After the Declaration of Independence, however, each of the States, in the exercise of their several sovereignties, established admiralty courts with varying powers. In 1777 Congress appointed a standing committee to entertain appeals from the State courts in cases of maritime prizes. Under the Articles of Confederation there was established by Congress a "Court of Appeals in cases of Capture," to which appeals might be taken from the State admiralty courts.

Under the present Constitution admiralty jurisdiction is wholly withdrawn from the States and vested exclusively in the Federal courts.

By the Judiciary Act of 1789 this jurisdiction was vested in the District Courts, where it has since remained.

Section 711 of the Revised Statutes provides that the District Courts shall have jurisdiction: "Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

In all prize cases an appeal lies direct from the district to the Supreme Court. In other cases an appeal lies to the Circuit Court of Appeals.

§ 599. Legislative Powers of Congress Flowing from Admiralty and Maritime Jurisdiction.

In The Lottawanna case [24] it was pointed out that the general doctrines of maritime law as they are to be deduced from the practice of civilized nations, from the decisions of their courts, and from the comments of scientific writers, are, in the absence of congressional statute to the contrary, to guide the Federal courts in the administration of their admiralty jurisdiction.

The Constitution does not in express terms confer upon Congress the power to supplement or alter by statute this general maritime law, but the grant to the judiciary of jurisdiction over all cases of admiralty and maritime jurisdiction—a jurisdiction which has, as we have seen, been held to be exclusive—has been construed to give to the Federal legislature a power over the law which the Federal courts are thus called upon to interpret and apply.

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[24] 21 Wall. 558. See also *Ex parte* Garnett (141 U. S. 1); Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (109 U. S. 578); United States v. Thompson (The Western Maid) (257 U. S. 419).

It is to be remarked that during the early period the power of Congress to legislate with reference to maritime matters was drawn from the Commerce Clause, which had been held to give Federal control of navigation between the States and with foreign powers, and it was only later when the admiralty jurisdiction had been construed to extend to all public navigable waters, that the grant of judicial control over admiralty and maritime matters was resorted to as a broader source of Federal control

§ 600. The Determination of the Sphere of Admiralty Jurisdiction a Judicial Question.

Though, as appears from the foregoing, Congress, and to a certain extent the State legislatures as well, have the power to fix the substantive law which the Federal admiralty courts are to apply, it is not within the power of these law-making bodies to determine the sphere of admiralty jurisdiction. This, it has been held, is a purely judicial function, which is vested, in final resort, in the Supreme Court.[25]

From the adoption of the principle that, from the grant of judicial power over matters of admiralty and maritime jurisdiction, a Federal legislative power is to be deduced is not to be drawn the more general rule that in all cases where Federal judicial power is granted, Congress may provide the law which is to be applied in the exercise of that jurisdiction. Thus, for example, such a legislative power is not implied where the judicial power is based, not upon the subject-matter in suit, but upon the character of the parties litigant.

As is elsewhere shown, in suits between the States, the Supreme Court from necessity finds itself obliged to determine the law applicable, which law may not be exactly the law of either of the States; so also, in suits between citizens of different States, for reasons which have been stated, the law of the States, at least as interpreted by their respective courts, is not always followed, but there has never been a suggestion that Congress might enact the law to be applied. Relations between the States of the Union being of a *quasi*-international character, it is eminently proper that, when necessary, general principles of jurisprudence should be applied. And where, in suits between citizens of different States, the Federal courts do not hold themselves concluded by the decisions of the State courts, it is not upon the ground that Federal law as distinct from State law is to be applied, but upon the doctrine that, as independent tribunals, the Federal courts have a right, co-ordinate with that of the State courts, to determine what the State law is.

In the case of admiralty and maritime causes, however, the condition is quite otherwise. Here the State courts have absolutely no jurisdiction. The general principles of the law to be applied are indeed furnished by the admiralty law of the world. But it is necessary that this body of general principles should be subject to change and addition by the legislatures of each country, and, as the Supreme Court has said, it would be indeed a strange and undesirable condition of affairs to have this legislation supplied by governments whose courts have no jurisdiction to apply it.

The legislative powers of Congress thus follow *ex necessitate*.

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[25] The St. Lawrence (1 Black, 522).

§ 601. State Legislative Powers with Reference to Admiralty Matters. It will be observed that the act vesting admiralty jurisdiction in the district courts saves to suitors, in all cases, their right to a common-law remedy, where that law is competent to give it. The effect of this provision is not to permit the State courts to exercise in any way admiralty jurisdiction, but to give to the suitor the option of pursuing in those courts any common-law right that he may have.[26]

But in no case may a State court entertain a suit in the nature of an admiralty proceeding, that is, a proceeding *in rem* against a vessel. This was conclusively determined in The Moses Taylor [27] and in Hine v. Trevor.[28]

However, the State courts may proceed *in rem* against vessels in non-maritime causes of action.

It is to be observed that when a party avails himself of the "saving clause" and seeks a common-law remedy, the rights and obligations involved are to be measured by the rules of maritime law. Thus, in Chelentis v. Luckenbach Steamship Co.[29] we find the court saying: "The distinction between rights and remedies is fundamental. . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea." [30]

In Red Cross Line v. Atlantic Fruit Co.[31] attention was again called to the doctrine that the statutory provision which saves to suitors common-law relief where that law is competent to give it, does not permit the States to make changes in the substantive admiralty law, but that "it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law."

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[26] Sherlock v. Alling (93 U. S. 99).

[27] 4 Wall. 411.

[28] 4 Wall. 555.

[29] 247 U. S. 372, 384.

[30] *Cf.* Robins Dry Dock Co. v. Dahl (266 U. S. 449). But see Benedict *On Admiralty* (5th ed.), § 26, where it is said: "In actions of tort between parties having no contractual relation the common law courts apply their own rules respecting the amount of recovery and the effect of contributory negligence. Thus, in collision cases, the common law court applies the common law rule that joint fault bars recovery instead of the maritime rule of divided damages. There is therefore a distinction between cases involving contractual relation and cases of simple tort independent of such relation." Citing Belden v. Chase (150 U. S. 674); N. Y. Harbor Towboat Co. v. N. Y. Lake Erie & W. R. R. Co. (148 N. Y. 574, 581).

[31] 264 U. S. 109.

In this case the State law involved was one providing for the enforcement of executory agreements to arbitrate. As to this act the court said: "The Arbitration Act deals merely with the remedy in the State courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to modify the substantive maritime law or to deal with the remedy in courts of admiralty."

In Union Fish Co. v. Erickson [32] it was held that an action in admiralty by the master of a vessel for the breach of a contract between him and the owner of the vessel could not be defeated by the application of a Statute of Frauds of the State in which the action was brought. This holding was based, not upon the proposition that the statute attempted to modify the substantive maritime law, but because it attempted to modify the remedial law of the admiralty courts.[33]

§ 602. States May Create Rights which the Admiralty Courts Will Enforce.

But, though the State courts may not exercise admiralty jurisdiction, it has been held that the State legislatures may, by statute, create maritime rights, which the Federal District Courts, sitting as admiralty tribunals, will enforce. In other words, the State law-making body may create rights which the State courts may not enforce, by admiralty proceedings, that is, *in rem* against the vessel, but which the Federal courts may.[34]

In Butler v. Boston Steamship Co.[35] a limitation upon the power of the States to create maritime liens which the Federal courts will recognize and enforce was suggested, though not definitely declared. In that case Justice Bradley, after applying an act of Congress in modification of the Federal maritime law, and with reference to a cause arising within the territorial limits of a State, said: "It might be a much more serious question whether a State law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction where neither the general maritime law nor an act of Congress has created such a liability. On this subject we prefer not to express an opinion." However, in Old Dominion S. S. Co. v. Gilmore,[36] as in other cases, the foregoing doubt has been held to be without good foundation, and liabilities created by State statutes for injuries resulting in death upon the high seas have been enforced by the Federal courts sitting in admiralty, by proceedings *in rem.*

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[32] 248 U. S. 308.

[33] See statement to this effect in Red Cross Line v. Atlantic Fruit Co. (264 U. S. 109).

[34] The Lottawanna (21 Wall. 558); and The Glide (167 U. S. 606).

[35] 130 U. S. 527.

[36] 207 U. S. 398.

The Supreme Court has held that until Congress acts on the subject a State may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas and not within the territory of any other sovereign, and that where a fund is being distributed in a proceeding to limit the liability of the owners of a vessel all claims to which the admiralty does not deny existence must be recognized whether admiralty liens or not. In this case the vessel belonged to a Delaware corporation. The law of Delaware gave damages for death caused by a tort. The vessel was in collision with another vessel belonging also to a Delaware corporation. It was held that claim against the owner of one of the vessels in fault for such death could be enforced in a proceeding in the admiralty brought by such owner to limit its liability.[37]

§ 603. State Workman's Compensation, and Employers' Liability Acts as Applied to Admiralty Causes.[38]

In Southern Pacific Co. v. Jensen,[39] the Supreme Court, by a five to four divided court, held unconstitutional a Workman's Compensation Act of the State of New York in so far as made applicable to employees whose work was maritime in nature. This decision came as a surprise to many for there was involved in the case no attempt upon the part of the State to enforce a right or liability in a suit in the nature of an admiralty proceeding.

In order to overcome the effect of the holding of the court in Southern Pacific Co. v. Jensen, Congress, by act of October 6, 1917,[40] amended Sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under State workmen's compensation acts. This act of Congress the Supreme Court held to be unconstitutional in Knickerbocker Ice Co. v. Stewart,[41] as an attempt to give to the States a legislative authority with reference to a field that, by the Federal Constitution, had been vested exclusively in the General Government.

". . . Congress cannot transfer its legislative power to the States—by nature this is non-delegable."[42]

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[37] The Hamilton (207 U. S. 398).

[38] See generally, upon this subject, E. T. Fell's "Recent Problems in Admiralty Jurisdiction," XL, *Johns Hopkins University Studies in Historical and Political Science,* 1922.

[39] 244 U. S. 205. See also Chelentis v. Luckenbach S. S. Co. (247 U. S. 372).

[40] 40 Stat. at L. 395.

[41] 253 U. S. 149.

[42] Citing *In re* Rahrer (140 U. S. 545); Field v. Clark (143 U. S. 649); Buttfield v. Stranahan (192 U. S. 470); Butte City Water Co. v. Baker (196 U. S. 119); Interstate Com. Com. v. Goodrich Transit Co. (224 U. S. 194).

In Western Fuel Co. v. Garcia,[43] the court held that the doctrine of Southern Pacific Co. v. Jensen [44] did not apply to a State statute which gave a right of action on account of death resulting from a maritime tort committed on navigable waters, and that, therefore, the admiralty courts might entertain a libel *in personam* for damages sustained by those to whom such right was given by the State statute, because, as the court said, "the subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." [45]

In Grant-Smith-Porter Ship Co. v. Rohde,[46] it was held that a State compensation act might apply to the accidental injury of a carpenter working upon an uncompleted vessel lying upon the navigable waters of the State, and that the remedy provided for by the act being an exclusive one, the right to recover damages in an admiralty court, which otherwise might have existed, was abrogated. The court declared that the contract for constructing the ship was in itself, that is, apart from the place where performed, non-maritime in character, in that Rohde's general employment, and his activities at the time of the accident, had no direct relation to navigation or commerce.

To meet the Knickerbocker case, Congress, by act of June 10, 1922,[47] declared that masters of vessels and members of their crews should be excluded from those who might claim under State acts compensation for maritime injuries. It was hoped that thus these States acts might be made effective for at least stevedores, repairmen, etc. However, this act also was held unconstitutional by the court in Washington v. Dawson and Industrial Accident Com. of California v. James Rolph Co.[48] The court, after reviewing decisions subsequent to Southern Pacific Co. v. Jensen and finding in them no departure from the doctrine of that case, said that the instant case, upon the contrary, manifested a purpose to permit the States to alter the general maritime law and thereby to introduce conflicting requirements—to prevent which had been the purpose of the Constitution when it adopted the law of the sea as the measure of maritime rights and obligations.

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[43] 257 U. S. 233.

[44] 244 U. S. 205.

[45] See also Grant-Smith-Porter Ship Co. v. Rohde (257 U. S. 469); and State Industrial Commission v. Nordenholt Corp. (259 U. S. 263), in which State laws were held not to interfere unduly with the general maritime law recognized by the admiralty courts.

[46] 257 U. S. 469. *Cf.* Miller's Indemnity Underwriters v. Braud (270 U. S. 59); Rosengrant v. Havard (273 U. S. 664).

[47] 42 Stat. at L. 634.

[48] 264 U. S. 219.

§ 604. Longshoremen's and Harbor Workers' Compensation Act.

In a further effort to meet the situation created by the decisions of the court in Southern Pacific Co. v. Jensen, Knickerbocker Ice Co. v. Stewart, and Washington v. Dawson, Congress, in 1927, enacted the Longshoremen's and Harbor Workers' Compensation Act.[49]

This act, which is an elaborate and detailed one, provides accident compensation for longshoremen and harbor workers who, the court held, were not and could not be covered by State compensation acts.[50] The act declares: "Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

In general, the administration of the act is placed in the hands of the United States Employees' Compensation Commission.

No decisions of the Supreme Court arising directly under this act have been made. It will, however, be observed that, granting the constitutionality of the act (regarding which there can be no reasonable doubt), the courts will continue to be confronted with the problem of determining in specific instances whether claimants have or have not suffered from maritime torts and whether or not, even if the torts may be held to be maritime in character, the circumstances permit State compensation acts constitutionally to apply. For, as has appeared in the cases of Western Fuel Co. v. Garcia,[51] Grant-Smith-Porter Ship Co. v. Rohde,[52] and Red Cross Line v. Atlantic Fruit Co.[53] there may be cases in which State laws may apply even though the accidents, by reason of the places where they occur, might, at the option of the plaintiffs, be brought in the admiralty courts.[54]

§ 605. Jurisdiction over Foreign Merchant Vessels.

The jurisdiction of the United States over private or merchant vessels when within American ports or harbors or territorial waters comes fairly within the admiralty and maritime jurisdiction of the Federal Government, but the principles governing its exercise are determined by the doctrines of general international law and of international comity rather than by those peculiar to American constitutional jurisprudence. Therefore, they do not need special consideration in the present chapter.[55]

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[49] 44 Stat. at L. 1424.

[50] Masters or members of crews of, and persons engaged by the master to load, unload or repair, vessels under eighteen tons net are not included.

[51] 257 U. S. 233.

[52] 257 U. S. 469.

[53] 264 U. S. 109.

[54] See the able article by M. J. Conten, "Ten Years of the Jensen Case" in 76 *Univ. of Penna. Law Review*, 926.

In The Pesaro[56] it was declared that the question whether a vessel arrested on process in libel *in rem* was exempt from such arrest because owned by a foreign government depended upon whether there is an implied exception of such vessels from the operation of Section 24, Clause 3, of the Judicial Code giving to the District Courts original jurisdiction of admiralty causes. The Supreme Court held that it had jurisdiction to entertain the appeal from the District Court, under Section 238 of the Judicial Code, the question being a jurisdictional one, but held that the status of the vessel as the property of a foreign government had not been effectively raised in the court below, since there had been there only a suggestion made directly to the court by the Ambassador of the foreign State together with a certificate of the American Secretary of State that the Ambassador was the duly accredited representative of the foreign State. The Supreme Court pointed out that this suggestion should have been made to the court below through an official channel of the United States.

In Berizzi Bros. Co. v. Steamship Pesaro,[57] the status of the vessel having been properly raised, the court held the ship to be immune from arrest.[58]

§ 606. Actions In Rem against Merchant Vessels Owned, Leased, Chartered or Requisitioned and Operated by the United States Government.

The extent to which, during recent years, merchant ships have been owned or leased or chartered and operated by the United States Government has made very important the question as to the extent to which such ships may be proceeded against in admiralty by private parties; that is, the extent to which it is proper that the courts should refuse to entertain such suits on the ground that they are suits against the United States. This subject also will receive consideration in Chapter which deals with the suability of the United States.[59]

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[55] For an examination of this general subject see Fell's *Recent Problems in Admiralty Jurisdiction*, Chapter III. Important instances of Federal legislation affecting foreign merchant or private vessels in American harbors are the Seaman's Act of December 17, 1898 (30 Stat. at L. 755, 763), and the Seaman's Act of March 4, 1915 (38 Stat. at L. 1164). As to the application of the National Prohibition Act (41 Stat. at L. 305) to foreign vessels in United States ports or territorial waters, see Cunard S. S. Co. v. Mellon (262 U. S. 100).

[56] 235 U. S. 216.

[57] 271 U. S. 562.

[58] At the hearing it was stipulated that the vessel, when arrested, was owned, possessed and controlled by the Italian Government, was not connected with its naval or military powers, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official, and that the Italian Government had never consented that its vessel be seized or proceeded against by judicial process.

§ 607. Jurisdiction on the High Seas.

The right of the United States to exercise jurisdiction over American vessels on the high seas is included within the Federal admiralty and maritime jurisdiction, but it can no doubt be also derived from the general international rights of the United States as a sovereign power. As to the criminal side of this jurisdiction, it is to be noted that the Constitution expressly grants to Congress the power "to define and punish piracies and felonies committed on the high seas." [60] Under this express grant it is possible for the United States to take jurisdiction of piracies committed by foreigners on foreign vessels on the high seas.[61]

As to the right of the United States under international law, or under its constitutionally granted admiralty and maritime jurisdiction, to punish offences committed by American citizens on foreign vessels on the high seas or even in foreign harbors there would seem to be no doubt. The fact of American citizenship brings the individual within American jurisdiction, and the fact that the offence is committed on navigable waters brings him within the Federal admiralty jurisdiction.[62]

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[59] See § 619.

[60] Art. I, Sec. 8, Cl. 10.

[61] United States v. Lewis (36 Fed. Rep. 449); United States v. Palmer (3 Wh. 610). In this last case Chief Justice Marshall said: "The Constitution having conferred on Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law?"

[62] As to the right of a State to take cognizance of, and exercise jurisdiction with reference to, the acts of its citizens wherever they may be, see the author's *Fundamental Concepts of Public Law*, pp. 400 *et seq.*

CHAPTER LXVI

SUITS TO WHICH STATES ARE PARTIES[1]

§ 608. Suits between States: Constitutional Provisions.

Article III of the Constitution provides that the judicial power of the United States shall extend "to controversies between two or more States." During the colonial period disputes between the colonies, especially those in relation to boundaries, had been settled in the English courts. Thus, for example, Mason and Dixon's Line was thus established.[2] Other intercolonial disputes were settled by the British Privy Council; for example, between Massachusetts and New Hampshire and New York in 1764.[3]

Under the Articles of Confederation, it had been provided that "The United States, in Congress assembled, shall . . . be the last resort, on appeal, in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever."

This jurisdiction, the Articles went on to provide, should be exercised by Congress by the appointment for each case of a special tribunal whose decision should be final and conclusive. Under the power thus granted a number of intercolonial disputes were presented. Two of these (between Massachusetts and New York, and South Carolina and Georgia) were settled by compromise out of court. A third, between Pennsylvania and Connecticut, resulted in the confirmation to Pennsylvania of the Wyoming region.[4] Upon the whole, however, it would appear that this mode of settlement of disputes between the colonies proved by no means effective, for, in Rhode Island v. Massachusetts,[5] we find Justice Baldwin in his opinion saying: "It is a part of the public history of the United States of which we cannot be judicially ignorant, that at the adoption of the Constitution there were existing controversies between eleven States respecting their boundaries, which arose under their respective charters and had continued from the first settlement of the colonies."

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[1] Dr. James Brown Scott, under the title *Judicial Settlement of Controversies between States of the American Union* (2 vols., Carnegie Endowment for International Peace, 1918) has compiled and published *in extenso*, all the opinions of the Supreme Court in suits between States, as well as opinions in other cases dealing more or less directly with the constitutional status of the States in the Union and their amenability to judicial process—such, for example, as the nature and extent of the Federal judicial power, and suits by individuals against States. Dr. Scott has also published another volume entitled *Judicial Settlement of Controversies between States of the American Union. An Analysis* (Carnegie Endowment for International Peace, 1919) in which he has subjected to analysis and explanation the eighty or more cases in which the Supreme Court, up to the time of his writing, had entertained suits between States of the Union. Attention should also be drawn to the small volume *The Supreme Court and Sovereign States* (Princeton University Press, 1924) by Mr. Charles Warren, formerly Assistant Attorney General of the United States.

[2] Pennsylvania v. Baltimore (1 Vesey, 44).

[3] *Cf.* Story, *Commentaries on the United States Constitution*, § 1675.

§ 609. Boundary Disputes.

The most important class of cases which have required the exercise of the authority granted to the Supreme Court to adjudicate between States have been those relating to disputed boundaries.

The first of these was that of New Jersey v. New York.[6] In his opinion awarding the process of subpœna, Chief Justice Marshall, after reciting the constitutional grant of judicial power, and referring to previous suits to which States had been parties and which had been entertained by the Supreme Court, said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." The Chief Justice went on to observe that should a defendant State, after due service of process, fail to appear (and, it was to be remarked that there was no means whereby a State might be compelled to appear in a suit brought against it) the complainant had the right to proceed *ex parte* to a final judgment.

The second boundary dispute between States brought before the Supreme Court was between Rhode Island and Massachusetts.[7] This suit was brought in 1832, but was not finally determined until 1838. In this case it was strenuously urged that the consent which the States, by the adoption of the Constitution, had given for the entertaining by the Supreme Court of suits between themselves, extended only to matters ordinarily judicially cognizable, and that it did not extend to suits of a political character, such as was a dispute regarding boundaries.[8] This contention the Supreme Court, in a very able opinion, refused to accept.

In Florida v. Georgia,[9] Missouri v. Iowa,[10] Florida v. Georgia,[11]

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[4] Jameson, *Essays in Constitutional History*, Chapter I.

[5] 12 Pet. 657.

[6] 5 Pet. 284, 290.

[7] Rhode Island v. Massachusetts (12 Pet. 657).

[8] The Constitution does not in terms extend the Federal judicial power to *all* cases between States.

[9] 11 How. 293

[10] 7 How. 660.

[11] 17 How. 478.

Alabama v. Georgia,[12] Virginia v. West Virginia,[13] South Carolina v. Georgia,[14] Indiana v. Kentucky,[15] Virginia v. Tennessee,[16] Iowa v. Illinois,[17] and Louisiana v. Mississippi,[18] the Supreme Court has without objection assumed jurisdiction in cases involving disputes as to boundaries.[19]

Since the cases already cited there have been a considerable number of other suits between States with regard to boundaries. Among them may be mentioned Oklahoma v. Texas,[20] Arkansas v. Tennessee,[21] and Michigan v. Wisconsin.[22] In this last case it was held that long acquiescence by one State in the possession of, and exercise of political jurisdiction over, territory by another State is conclusive of the title and rightful authority of the latter State. It was also held that the actual possession of a part of a tract of territory by a State under a color of title describing a larger tract, extends the possession to the entire tract in the absence of actual adverse possession by another State.

In Louisiana v. Texas [23] complaint was made by the plaintiff State that the agents of the defendant State were administering certain quarantine laws in a manner that discriminated against citizens of the plaintiff State. To this bill demurrer was filed upon the ground, *inter alia*, that the issues presented by the bill were not between the two States, but between certain citizens of the State of Louisiana, engaged in interstate commerce, and that the State, as a State, was not interested in a proprietary or other manner, and was not, therefore, entitled to bring suit. Concluding its opinion, the court said:

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[12] 23 How. 505.

[13] 11 Wall. 39.

[14] 93 U. S. 4.

[15] 136 U. S. 479.

[16] 158 U. S. 267.

[17] 202 U. S. 59.

[18] 202 U. S. 1.

[19] The cases of Virginia v. West Virginia, South Carolina v. Georgia, and Virginia v. Tennessee arose out of compacts made between the States.

[20] 256 U. S. 70. In this case the United States intervened, setting up an interest as trustee of certain Indian interests.

[21] 246 U. S. 158. In this case it was held that the boundary line between States separated by a navigable stream is in the middle of the navigable channel—by the rule of the "thalweg"—and not a line equidistant between the banks of the stream. In this case it was also held that the same rule applies between States as between private proprietors when the bed or channel of a boundary stream is changed by the natural processes of erosion and accretion, namely, that the dividing line follows the varying course of the stream; but, that in cases of sudden and radical changes where the stream leaves its old bed and forms a new one, that is, by what is known as "avulsion," the boundary line remains in the middle of what was the old channel, even though no water flows therein.

[22] 270 U. S. 295.

[23] 176 U. S. 1.

"In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution."

§ 610. State as Parens Patriæ.

It must be confessed that, in Louisiana v. Texas, the court took a very narrow view of the right of a State to sue as *parens patriæ.* A much more liberal view was taken in Missouri v. Illinois and Chicago Dist.[24]

In that case the interesting point was raised and sustained that the general health and prosperity of its citizens gives to a State, as such, an interest sufficiently direct to enable it to prosecute a suit for equitable relief in their behalf against another State. This case arose out of the construction, under the authority of the State of Illinois, by the Sanitary District of Chicago, of an artificial drainage canal by which large quantities of sewage were carried into and thus polluted the Mississippi river which furnishes the water supply to inhabitants of the State of Missouri.

It is thus seen that in this case the court held that, under certain circumstances, a State can invoke the original jurisdiction of the Supreme Court even though it has no direct pecuniary or proprietary interests involved, but is standing, as it were, as trustee, *parens patriæ,* or representative of a considerable portion of its citizens.

In Pennsylvania v. West Virginia and Ohio v. West Virginia[25] the question was as to whether a State in behalf of itself as a large consumer of natural gas and as representative of private consumers within the State might enjoin another State from enforcing a law which, in effect, required companies handling natural gas to prefer consumers within that State to those in the complainant State receiving the gas through interstate commerce. Upholding the right of the complainant State to sue in behalf of its inhabitants, the court said: "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not a merely remote or ethical interest, but one which is immediate and recognized by law."

In Heckman v. United States [26] it was held that, in view of the peculiar relations in which the United States stood to the Indians, it had a right to invoke the equity jurisdiction of the courts to cancel conveyances of allotted lands of the Indians in violation of restrictions placed by Congress on the power of alienation of such lands. Out of these peculiar relations, said the court, there arose a duty upon the part of the United States to protect the Indians, and, though the interest of the United States thus created could not be expressed in terms of money or property, it was sufficient to provide a *locus standi* for the United States in the courts.

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[24] 180 U. S. 208.

[25] 262 U. S. 553, 592.

[26] 224 U. S. 413.

The case of Georgia v. Tennessee Copper Co.,[27] though not one between States, illustrates a further definition by the Supreme Court of what will constitute a justiciable interest upon the part of a State enabling it to seek relief by Federal judicial process. Here an injunction was granted, at the suit of the State of Georgia, to enjoin the defendant company located in the State of Tennessee from discharging noxious gases from its works over the border of the State upon the territory of the plaintiff. In its opinion the court observed that it is proper to grant relief to a State, as a *quasi*-sovereign body, under circumstances which would not warrant it in a suit between private persons.

In New York v. New Jersey [28] the court held that, while the State of New York might properly maintain an original suit to enjoin the defendant State and its sewage commissioners from discharging such an amount of sewage into the waters of upper New York bay as would cause a pollution of such waters to the detriment of the health, property and commercial welfare of the people of the State and City of New York, an injunction would not issue in the instant case because the injury had not been established by clear and convincing evidence. The court said: "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence." The bill of complaint of the State was therefore dismissed, but without prejudice to its renewal should the operation of the sewer of the defendant State in the future become such as to require the court's interposition.

In North Dakota v. Minnesota,[29] the court again emphasized the necessity for preponderant proof of the necessity for the exercise of its jurisdiction to control the acts of one State at the suit of another State, before it would exercise that jurisdiction. "In such action by one State against another," said the court, "the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties."

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[27] 206 U. S. 230.

[28] 256 U. S. 296, 309.

[29] 263 U. S. 365.

In Virginia v. West Virginia [30] the court said: "The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. . . . Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits with which we proceed to deal. . . . A State is superior to the forms that it may require of its citizens."

In Kansas v. Colorado [31] was raised the question whether one State may obtain an order from the Supreme Court restraining another State from operating irrigation works of such a character as to deplete the water supply of a river rising in that State and flowing into and through the complainant State. It was held that the controversy was of a justiciable nature, and would be entertained by the court. As to the law to be applied, the court held itself bound by the law of neither State, and declared: "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law as the exigencies of the particular case may demand."

In Wyoming v. Colorado [32] the court had again to consider the conflicting interests of two States in streams flowing from one into the other, and again asserted that the upper State of such a stream does not have such ownership or control of the waters flowing therein as to entitle it to divert and use them without regard to the injury or prejudice to the rights of the lower State in such waters. However, the court held that when both States had recognized and adopted the doctrine of appropriation with reference to flowing waters, rather than the common-law doctrine, the doctrine thus accepted should be applied to controversies between them with regard to their respective rights in waters of non-navigable streams flowing through both States.

The interesting cases of New Hampshire v. Louisiana [33] and South Dakota v. North Carolina [34] receive consideration in the chapter entitled The Suability of the States.

§ 611. States as Plaintiffs in Civil Suits against Individuals.

The question as to the character of interests requisite for the institution and maintenance of suits by the States of the Union has necessarily to be considered as well when individuals have been proceeded against as when States have been the parties defendant. The case of Georgia v. Tennessee Copper Co.[35] has been spoken of in the preceding paragraphs. A few other cases will sufficiently indicate the character and extent of this branch of the Federal judicial power.

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[30] 220 U. S. 1, 27.

[31] 185 U. S. 125.

[32] 259 U. S. 419.

[33] 108 U. S. 76.

[34] 192 U. S. 286. For recent suits between States, see Wisconsin v. Illinois; Michigan v. Illinois; New York v. Illinois (278 U. S. 367); and Wisconsin v. Illinois; Michigan v. Illinois; New York v. Illinois (50 Sup. Ct. Reporter 266).

In Pennsylvania v. Wheeling & B. Bridge Co.,[36] upon suit of the plaintiff State, the defendant was, by decree, ordered to remove or elevate a bridge which, under color of a Virginia statute, it was constructing, on the ground that it obstructed navigation to and from the ports of Pennsylvania, and that the State, as a State, was interested directly in having the obstruction removed.

In Wisconsin v. Duluth [37] suit was brought to enjoin the city of Duluth from maintaining a canal which drained water from the St. Louis river, and thus injured that stream as a channel of navigation to the detriment of the interests of the citizens of the plaintiff State. The court, however, found that the United States had, as a matter of fact, assumed possession and control of the canal, and, that, this being so, the State of Wisconsin could not complain or be granted relief.

In Wisconsin v. Pelican Insurance Co.[38] was raised the very important question as to the right of a State to sue, in the courts of another State of the Union, citizens or corporations of other States to recover pecuniary penalties imposed by the criminal law of the plaintiff State. The court held that the judiciary article of the Constitution did not authorize, nor did the "full faith and credit" clause compel, the State courts to entertain such a suit.

In Mississippi v. Johnson [39] and Georgia v. Stanton [40] the Supreme Court refused to grant injunctions restraining the defendants from executing, in the course of their official duties, an act of Congress which was alleged unconstitutionally to affect the political rights of the State. The political rights, rights of sovereignty, the court held were not subjects within the power of the judiciary to determine and protect.

In Texas v. White [41] proprietary rights of the State were involved, and jurisdiction was assumed by the court and relief granted. So also, in Craig v. Missouri,[42] Florida v. Anderson,[43] and Alabama v. Burr [44] proprietary rights were involved, and jurisdiction exercised.

In Oklahoma v. Atchison, T. & S. F. R. Co.,[45] it was held that a State had not sufficient interest, in its corporate capacity, to entitle it to bring a suit to enjoin a foreign railway company from charging more than specified rates on certain domestic shipments, the State not being itself, in its governmental capacity, engaged in the sale or transportation of the commodities involved. As to this the doctrine declared in Louisiana v. Texas [46] was held to be controlling.

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[35] 206 U. S. 230.

[36] 13 How. 518.

[37] 96 U. S. 379.

[38] 127 U. S. 265.

[39] 4 Wall. 475.

[40] 6 Wall. 50.

[41] 7 Wall. 700.

[42] 4 Pet. 410.

[43] 91 U. S. 667.

[44] 115 U. S. 413.

[45] 220 U. S. 277.

In Oklahoma *ex rel.* West v. Gulf, C. & S. F. R. Co.[47] it was held that the court could not take original jurisdiction at the instance of the State against persons or corporations of other States when the suit, though civil in form, was, in its essential character, one to enforce by injunction its own penal legislation. The court also pointed out, as another decisive reason why it should not entertain the suit, that a State could not invoke the court's original jurisdiction where the primary purpose was to protect its citizens generally against the violation of its laws by the corporations or persons sued,—that the provision of the Constitution extending the original jurisdiction of the court to "cases in which a State shall be a party," is not to be interpreted as embracing suits of that kind.

§ 612. Suits between the United States and a State of the Union.

Article III of the Constitution does not, in so many words, provide for Federal jurisdiction in suits between a State and the United States, but it does extend the Federal judicial power "to controversies to which the United States shall be a party." Under this grant suits brought by the United States against individual States of the Union have been entertained and decided by the Supreme Court.

In United States v. North Carolina [48] an action of debt upon certain bonds issued by the defendant State was tried and determined upon its merits, judgment being rendered in favor of the defendant. No question of jurisdiction was discussed in the briefs of counsel or in the opinion of the court. In a later case, however, it was declared that "it did not escape the attention of the court, and the judgment would not have been rendered, except upon the theory, that this court has original jurisdiction of a suit brought by the United States against a State." [49]

In United States v. Texas [50] the United States again successfully appeared as plaintiff in a suit against a State, this time with reference to a matter of boundary. Here the question of jurisdiction was raised, carefully considered and sustained.

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[46] 176 U. S. 1.

[47] 220 U. S. 290.

[48] 136 U. S. 211.

[49] United States v. Texas (143 U. S. 621). *Cf. Columbia Law Review*, II, 283, 364, "Notes on Suits Between States," by Carmen F. Randolph.

[50] 143 U. S. 621.

Only since 1902 may it be said to have been certainly determined that the Supreme Court, the United States consenting, may assume jurisdiction in suits brought by a State of the Union against the United States. In Chisholm v. Georgia,[50a] Chief Justice Jay had indicated, *obiter*, that such a suit would not be entertained for the reason that the court would be without power to enforce its orders should judgment be rendered against the defendant. In Florida v. Georgia,[51] however, the United States was allowed by the court to intervene in a suit between two States, but without becoming one of the parties to the record. And in Mississippi v. Johnson [52] it was indicated that in a proper suit a bill might be filed by a State against the United States. Finally, in Minnesota v. Hitchcock,[53] decided in 1902, jurisdiction was squarely asserted. In that case it was held that a suit by a State to enjoin the Secretary of the Interior of the United States from selling certain Indian lands, was a suit against the United States with reference to a matter regarding which it had consented to be sued.

§ 613. Suits between a State of the Union and Foreign States or Their Citizens.

As to controversies between a State and foreign States, it may be said that no such suits have ever been brought, and one can, therefore, only speculate as to the extent of Federal judicial power under the clause of Article III of the Constitution which extends the Federal judicial power to controversies "between a State, or the citizens thereof, and foreign States, citizens, or subjects." We do know, however, by judicial determination, that neither a "Territory," [54] an Indian tribe,[55] nor the District of Columbia [56] is a "State" within the meaning of the word as used in this clause of the Constitution.

Whether or not, if a suit were brought by a foreign State, it would be entertained by the Supreme Court, is very doubtful. A foreign State could not, of course, be compelled to appear as a party defendant in such a suit, and reason would, therefore, seem to suggest that it should not be permitted to appear as a party plaintiff unless, of course, the defendant State should give its consent. Madison took this view. "I do not conceive," he said, "that any controversy can ever be decided in these courts between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made." [57] Story, in his *Commentaries*, takes the same view.[58] On the other hand, as will be shown in the chapter dealing with The Suability of States, the Supreme Court has entertained suits brought by the United States against States of the Union, and without their consent, notwithstanding the fact that they are not permitted to sue the United States without its consent. In Hans v. Louisiana [59] is a *dictum* approving the dissenting opinion of Justice Iredell in Chisholm v. Georgia, according to which it was declared not to have been the intention of the framers of the Constitution to create any new remedies unknown to the law. From this it would follow that the Supreme Court could not take jurisdiction of a case between a foreign State and a State of the Union, even with the consent of both parties.[60]

[50a] 2 Dall. 419.

[51] 11 How. 293.

[52] 4 Wall. 475.

[53] 185 U. S. 373.

[54] Smith v. United States (1 Wash. Ter. 262).

[55] Cherokee Nation v. Georgia (5 Pet. 1).

[56] Hepburn v. Ellzey (2 Cr. 445).

[57] *Eliot's Debates*, II, 391.

[58] § 1699.

§ 614. Foreign States May Sue Private Parties in American Courts.

There would seem to be no question but that foreign States, their rulers or their duly authorized agents, may sue private individuals or corporations in American courts, State as well as Federal. A leading case upon this subject is The Sapphire v. Napoleon III.[61]

However, the determination as to when a given government can be held to have such a status as to entitle it to sue as such is one the determination of which, in substance, lies within the authority of the political departments of the United States Government.[62]

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[59] 134 U. S. 1.

[60] Upon this point see article by Carmen F. Randolph in *Columbia Law Review*, II (1902), p. 283, entitled "Notes on Suits Between States."

[61] 11 Wall. 164.

[62] *Cf.* the author's *Fundamental Concepts of Public Law*, Chapter XX, "De Facto and De Jure Governments," and Chapter XXI, "Status of Unrecognized Governments."

CHAPTER LXVII

THE SUABILITY OF STATES

§ 615. A Sovereign State May Not Be Sued without Its Consent.

That a sovereign is not subject to suit, without its consent, is a principle that has come down unchallenged since the time of Rome. It has found expression in the rule that "the sovereign can do no wrong" and has been adopted by the English common law as fully as, indeed, if anything, more fully than by the systems of jurisprudence founded upon the civil law.

In civil law countries the State is often held liable in actions based upon the torts of its agents as well as in those of a contractual nature; whereas, in the United States the individual whose rights have been violated by persons acting under State authority has no remedy against the State, except by express permission, and this permission has never been granted except with reference to contract claims. The injured individual has, however, right of action against the public officials by whose illegal acts he has been wronged, but these officials may be financially irresponsible, and thus the remedy, in fact, be of no value.

In the case of Chisholm v. Georgia,[1] decided in 1793, it was held that, under the terms of the Federal Constitution, which provided that the judicial power of the Federal Government should extend to all cases "between a State and citizens of another State," a State might be made party defendant in a suit brought by a citizen of another State.

The popular objection to this decision immediately aroused and manifested in the adoption of the Eleventh Amendment is a matter of familiar history. The phraseology that the judicial power of the United States "shall not be construed to extend," instead simply that it "shall not extend" to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, was employed in order to give to the amendment a retroactive effect, and thus defeat suits similar to that of Chisholm v. Georgia, already pending. And thus, when the first of these pending cases came before the Supreme Court, it declared, in a unanimous opinion, that all these cases should be dismissed because of want of jurisdiction.[2]

It will be observed that the Eleventh Amendment does not in terms declare that the judicial power of the United States shall not be construed to extend to suits brought against a State by its own citizens. Nor is there anywhere in the Constitution a declaration that the United States itself shall not be sued by one of its own citizens. The Supreme Court has, however, held that, in the absence of an express grant of jurisdiction, such suits are, by the generally accepted principles of public law, beyond the jurisdiction of the courts. Indeed, in the case of Hans v. Louisiana [3] the court held that the decision in Chisholm v. Georgia had been an erroneous one in holding that a State could be sued by a citizen of another State.

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[1] 2 Dall. 419.

[2] Hollingsworth v. Virginia (3 Dall. 378).

In New Hampshire v. Louisiana [4] the Supreme Court refused to countenance the attempt of citizens to evade the operations of the Eleventh Amendment by transferring their pecuniary claims to another State and having that State bring suit in their behalf.

In the case of South Dakota v. North Carolina,[5] however, the true party of interest was shown to be the plaintiff State. Jurisdiction was assumed by the Supreme Court and a judgment and decree awarded against the defendant State.

Cohens v. Virginia [6] held that the Eleventh Amendment did not prevent a suit, originally instituted by a State against an individual, from being appealed to the Supreme Court by the individual for the purpose of asserting a constitutional right as a defence against the charge made against him by the State.

In Bank of the United States v. The Planters' Bank of Georgia [7] it was held that a suit against a corporation chartered and partly owned by the State was not a suit against the State. The principle laid down in this case was again applied in the cases of Briscoe v. Bank of Kentucky,[8] and Bank of Kentucky v. Wister,[9] although the State in these cases was the exclusive owner of the stock of the bank.

In Murray v. Wilson Distilling Co.[10] the important doctrine was declared that when a State undertakes a private business, as, for example, the selling of liquor, it does not forfeit its immunity to suit under the Eleventh Amendment, and may not, therefore, be sued with reference to transactions connected with such non-governmental business.

§ 616. Effect of Eleventh Amendment upon Federal Constitutional Rights Guaranteed against State Violation.

In a series of great cases the Supreme Court of the United States has laid down the doctrine that the Eleventh Amendment does not grant to States nor to their agents a power, unrestrainable by judicial process, either to interfere with the exercise of Federal rights, or, under color of unconstitutional legislation, to violate the private rights of individuals. Where this danger has been threatened, writs of injunction have been issued, and, for the performance by State officials of purely ministerial acts prescribed by law, mandamus has been awarded.[11]

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[3] 134 U. S. 1.

[4] 108 U. S. 76.

[5] 192 U. S. 286.

[6] 6 Wh. 264.

[7] 9 Wh. 904.

[8] 11 Pet. 257.

[9] 2 Pet. 318.

[10] 213 U. S. 151.

Acting under the right thus declared of preventing a State, or rather the officials of a State, from acting under laws unconstitutional, either because impairing the obligation of contracts, or taking property without due process of law, the Federal courts, while declaring themselves unable to secure to private individuals an enforcement of their claims against States, have nevertheless been able to extend their protecting power to prevent the States from taking action upon their part to enforce against individuals and against Federal officials claims not supported by valid laws.

In a number of cases, however, the Supreme Court has not permitted this principle of the legal responsibility of the agents of a State to countenance what is in actual effect a suit not against them personally, but against them officially as agents of the State, and, therefore, in reality against the States themselves whose officials they are. Nor has the court been willing to command the performance by a State official of other than mere ministerial acts in which no official discretion has been involved. The distinctions which have had to be drawn are, however, in many instances, very fine, and cannot be briefly outlined. The more important cases are cited in the footnote.[12]

In Fairmont Creamery Co. v. Minnesota[13] it was held that a State which had properly been made a defendant in a writ of error to review a criminal conviction which included the constitutionality under the Federal Constitution of the statute under which the conviction had occurred, might, if defeated, be taxed with costs in accordance with Rule 29, Section 3, of the Supreme Court, and as authorized by act of

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[11] Hans v. Louisiana (134 U. S. 1); United States v. Peters (5 Cr. 115).

[12] Louisiana v. Jumel (107 U. S. 711); Hagood v. Southern (117 U. S. 52); Cunningham v. Macon & B. R. R. Co. (109 U. S. 446); Pennoyer v. McConnaughy (140 U. S. 1); *In re* Ayers (123 U. S. 443); Antoni v. Greenhow (107 U. S. 769); *In re* Tyler (149 U. S. 164); Scott v. Donald (165 U. S. 58); Smith v. Reeves (178 U. S. 436); Poindexter v. Greenhow (114 U. S. 270); McGahey v. Virginia (135 U. S. 662); Reagan v. Trust Co. (154 U. S. 362); Fitts v. McGhee (172 U. S. 516); *In re* Young (209 U. S. 123). See Wadley Southern R. Co. v. Georgia (235 U. S. 651); Truax v. Raich (239 U. S. 33); Greene v. Louisville & I. R. Co. (244 U. S. 499), Louisville & Nashville R. Co. v. Greene (244 U. S. 522); Illinois Central R. Co. v. Greene (244 U. S. 555); Looney v. Crane Co. (245 U. S. 178); Public Service Co. v. Corboy (250 U. S. 153); Massachusetts State Grange v. Benton (272 U. S. 525); Pullman Co. v. Knott (243 U. S. 447).

[13] 275 U. S. 70, 74.

Congress of March 3, 1911.[14] The court after conceding that a sovereign State cannot, without its consent, be taxed with costs in either civil or criminal cases,[15] said: "But is the State [of Minnesota] to be regarded as the sovereign here? This court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the State's consent, but by virtue of a law, to which it is subject. Though a sovereign in many respects, the State when a party to litigation in this court loses some of its character as such."

§ 617. Statutory Regulation of Injunctions from Federal Courts Restraining State Officials.

Congress has, by statute, made special provision for the use by the Federal courts of writs of injunction to stay proceedings in State courts, and for the granting of interlocutory injunctions suspending or restraining the enforcement of State statutes by State officials. As to this, see Sections 265 and 266 of the Judicial Code.

§ 618. Suability of State Agencies and Minor Political Bodies or Other Agencies.

In pursuance of this subject it is to be observed that the principle of the non-amenability of the States of the Union to suit does not extend to their incorporated local political agencies. These are suable, but, it has been held that they may not be held liable, without consent of their State, in contract or in tort in so far as they are viewed as agencies of the State, and not merely as local agencies. When viewed in this latter light they may be sued in contract, and even in tort, money judgments may be rendered against them, and mandamus may be awarded to compel the necessary appropriation and the levying and collection of taxes to pay the judgments thus rendered. In some cases also, the private property of such public corporations which is not directly used in the public service may be sold on execution.[16]

§ 619. Suits against the United States.

In United States v. Clarke [17] it was declared by Marshall that the United States was not suable of common right, and unless the plaintiff could bring his suit within the terms of some permissive act of Congress, the court could not entertain it. In The Siren v. United States [18] this was quoted with approval and the further observation made that the exemption from suit extends to property of the United States. The interesting point was, however, made in this case, that though a lien attaching to a piece of property owned by the State is not enforceable, the lien itself may exist, and becomes enforceable as soon as the State voluntarily sells or otherwise parts with the actual possession of the piece of property.

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[14] 36 Stat. at L. 1162.

[15] United States v. Barker (2 Wh. 395); Reeside v. Walker (11 How. 272); The Antelope (12 Wh. 546); United States v. Boyd (5 How. 29).

[16] Meriwether v. Garrett (102 U. S. 472); Rees v. Watertown (19 Wall. 107); Hopkins v. Clemsen Agricultural College (221 U. S. 636); Lankford v. Platte Iron Works Co. (235 U. S. 461).

[17] 8 Pet. 436.

In The Davis [19] it was held that personal property of the United States was subject to a lien for salvage purposes, if such property was not actually in the possession of the United States, and if the lien could be enforced without bringing a direct suit against the United States. Defining what should be deemed possession under this rule, the court said that it must be an actual and not a constructive one—one that "can only be changed under process of the court by bringing the officer of the court into collision with the officer of the Government, if the latter should choose to resist."

In United States v. Lee [20] the court held that a suit in ejectment against Federal officers in charge of property ownership of which was claimed by the United States (its Attorney-General intervening in the suit for the purpose of setting up this claim) was not a suit against the United States.[21]

In Tindal v. Wesley [22] the doctrine of United States v. Lee [23] was applied to the States of the Union.

§ 620. Statutory Consent of the United States and of the States to Be Sued.

The United States by act of Congress and various of the States of the Union by constitutional or statutory provision, have consented to be sued by individuals as to specified matters.[24]

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[18] 7 Wall. 152.

[19] 10 Wall. 15.

[20] 106 U. S. 196.

[21] See also Stanley v. Schwalby (162 U. S. 255); and also the definition of the doctrine of United States v. Lee as given in Cunningham v. Macon & B. R. R. Co. (109 U. S. 446). Later judicial phases of the suability of the United States are to be found in Belknap v. Schild (161 U. S. 10); Oregon v. Hitchcock (202 U. S. 60); and International Postal Supply Co. v. Bruce (194 U. S. 601); Hooe v. United States (218 U. S. 322); United States *ex rel.* Goldberg v. Daniels (231 U. S. 218); Philadelphia Co. v. Stimson (223 U. S. 605); Louisiana v. Garfield (211 U. S. 70); Louisiana v. McAdoo (234 U. S. 627); W. U. Tel. Co. v. Poston (256 U. S. 662); Sloan Shipyards Corp. v. United States Shipping Board (258 U. S. 549).

[22] 167 U. S. 204.

[23] 106 U. S. 196.

[24] The exemption of the United States from suit may be waived only by legislative act and not by the Secretary of War or the Attorney-General or any other officer not expressly authorized so to do. Stanley v. Schwalby (162 U. S. 255).

In practically all cases this suability has been limited to actions in contract, express or implied. Almost never have they rendered themselves pecuniarily responsible for the tortious acts of their agents.[24a] From a viewpoint of strict equity, and the general doctrine governing the responsibility of the principal for the acts of his agents, it might seem strange that claims of the individual against his State based upon contract are allowed to be adjudicated, whereas those based upon tort are not; in other words, that, the more wrongful and illegal the acts of the agents, the less liable is his principal. This state of the law, however, is a logical and necessary outcome of the general principle of American and English law that an *ultra vires* act of a public official is not the act of his government, but is a private act for which he may be held civilly and criminally responsible.

§ 621. Suits against Vessels Owned, Requisitioned, or Chartered by the United States.

Since early times, under the admiralty law of the United States, a ship has been differentiated from its owner and treated as itself an actor and responsible party. Under this theory, proceedings against the vessel, irrespective of who its owners may be, it would seem that ships owned, requisitioned or chartered by the United States should not be regarded as suits against the United States.[25] However, it is established that a vessel of the United States, even though used for ordinary commercial purposes, may not be libelled, such a proceeding being held precluded by the immunity of the United States from suit.[26] The court, however, in The Siren pointed out that the inability to enforce a claim against a public vessel is not inconsistent with the existence of the claim itself, and can therefore be enforced if, and when, the vessel becomes subject to the jurisdiction and control of the courts. In this case the vessel, by capture, had become the property of the United States, and had been condemned and sold and the proceeds deposited with the Assistant Treasurer of the United States, but were still subject to the order of the prize court. Under these circumstances the Supreme Court held that a lien for damages against the vessel arising out of a collision in which The Siren had been at fault, might be paid out of the proceeds from its sale before they were distributed to its captors as then provided by law. The argument was that when the United States had, as actor, asked that the captured vessel be condemned and sold, it had made it subject to all claims which existed upon the vessel subsequent to its capture.

[24a] But see Suits in Admiralty Act of March 9, 1920 (41 Stat. at L. 525).

[25] Under general international law and comity the ships of war and their cargoes are exempt from local process and arrest. The Santissima Trinidad (7 Wh. 283). The same immunity attaches to government transports, although not armed. The Pampa (245 Fed. Rep. 137); The Maipo (252 Fed. Rep. 627). And also to other public vessels, such as light ships. Briggs v. Lightboat [11 Allen (Mass.) 157].

[26] The Siren (7 Wall. 152). In this respect the practice of the United States is not as liberal as that of England. Formerly, in England, it was held that, in cases of damage done by vessels belonging to the Crown remedy might be sought against their commanders. The present practice, however, is to file a libel *in rem* upon which the court directs the Registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the Crown, which is almost always done. The later proceedings are then the same as in other cases in which the Crown is not concerned.

It would seem that the ruling in The Siren implied or carried the doctrine that a lien will attach to a vessel, even when owned and operated by the United States, and, though unenforceable against the vessel so long as it remains the property of the United States, can be enforced when the vessel ceases to be thus owned and immune from libel. However, in The Western Maid[27] the court refused to recognize this, and held, in effect, that a legal liability on the part of a vessel cannot be created while a vessel is in the possession of the United States. The only attempt made by the court to distinguish this ruling from that stated in The Siren was that, in that case, the United States, by coming into court, was to be assumed to have consented to submit to just claims of third persons in respect of the same subject-matter.[28]

The severity of the American rule with regard to the right to proceed against vessels owned, requisitioned or chartered and operated by the United States has been much mitigated by statute. Thus, when the Emergency Fleet Corporation was created, it was provided that ships purchased, chartered or leased by it and employed solely as merchant vessels should be subject to the admiralty law irrespective of the interest of the United States in them.[29]

§ 622. Acts of State.

In England the term "Act of State" would not appear to have an exact meaning. At any rate, it is there often so employed as to include matters which, in the United States, are termed "political." However, when employed in a narrower and more technical sense an "Act of State" is one done with the authority of the Crown outside British territory, and affecting aliens.[30]

It is not certain whether this English doctrine has been adopted by the United States courts. Certainly it has not been carefully considered, defined, and then accepted. In a comparatively recent case, however, it would appear that the doctrine was recognized. The Governor General of the Philippine Islands, without legal authority, expelled certain aliens, but his action was later authorized by the Philippine Legislature. Holding that the Governor General thus gained legal immunity for the acts which were illegal at the time they were committed, the Supreme Court said: "It is held in England that an act of State is a matter not cognizable in any municipal court and that was the purport of the Philippine Act declaring the deportation not subject to question or review." [31]

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[27] 257 U. S. 419.

[28] But see United States v. The Thekla (266 U. S. 328).

[29] Shipping Board Act of September 7, 1916 (39 Stat. at L. 730). This provision was re-enacted by the statute of July 15, 1918 (40 Stat. at L. 900). See also Section 4 of the act of March 9, 1920 (41 Stat. at L. 525).

[30] Buron v. Denman (2 Ex Rep. 167); Musgrove v. Chun Teeong Toy [L. R. Ap. Cases (1891), 272].

It is to be observed that here the Supreme Court was not dealing with an act which came within the strict definition of an act of State since it was not one that had been committed outside the territory subject to American political jurisdiction. The propriety of thus referring for support to the British doctrine of act of State is thus highly doubtful.

§ 623. Liability of the State for the Acts of Its Officers.

The doctrine of the non-suability of the State prevents the prosecution of a claim against the United States, whether that claim be founded upon a tort of one of its agents, or is one arising out of a contract.[32]

§ 624. Legal Liability of Public Officials to Private Individuals Injured by Their Acts: Ultra Vires Acts.

As has elsewhere been shown in this treatise, a fundamental principle of American law is that the legality of acts of public officers is determined in the ordinary courts according to the same rules that govern the decision of suits between private individuals. Thus, generally speaking, no officer can defend an *ultra vires* or otherwise illegal act by setting up his official position or exhibiting the command of a political superior. This last statement as to the non-applicability of the principle of *respondeat superior* is, perhaps, subject to this qualification, that the order of an administrative superior, *prima facie* legal, though in fact not legal, may be set up in defence of an act commanded by military superiors.[33]

§ 625. Criminal Liability of Officials.

As elsewhere pointed out, where the performance of a ministerial duty is commanded by an administrative superior, mandamus will issue to the subordinate compelling obedience thereto. Moreover, in very many cases "the neglect or failure of a public officer to perform any duty he is required to perform is an indictable offence even though no damage was caused by the default, and a mistake as to his powers or with relation to the facts of the case is no protection."[34] This criminal liability is, however, as Professor Goodnow observes,[35] sometimes difficult of enforcement owing to the fact that prosecution of all crime is in the hands of a district attorney or other public prosecutor who is closely affiliated with the administration.

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[31] Tiaco v. Forbes (228 U. S. 549).

[32] Gibbons v. United States (8 Wall. 269).

[33] See, for example, *In re* Fair (100 Fed. Rep. 149). As to the non-application of this doctrine in civil matters, see Hendricks v. Gonzalez (67 Fed. Rep. 351).

§ 626. Responsibility of Officers for Improper Exercise of Authority: Malice, etc.

Thus far we have been considering the criminal and civil responsibility of public officers for *ultra vires* and otherwise illegal acts. We have now to consider their responsibility to private individuals for acts committed by public officials within the general scope of their respective authorities, but characterized by undue severity, discrimination, or malice.

In general no officer is held responsible in damages to an individual for non-performance or negligent performance of duties of a purely public or political character.

So long as public officers act within the general sphere of their authority, their legal responsibility to private individuals for the manner in which they act, whether their acts be dictated by malice, or characterized by negligence, is very slight.

A case in which this whole subject is comprehensively treated is that of Spalding v. Vilas.[36]

§ 627. Responsibility of Judges of Courts of Superior or General Jurisdiction.

That judges of courts of superior or general jurisdiction are not liable to civil suits for judicial acts, even though maliciously or corruptly done, has already been indicated, the cases in point being reviewed by the court in Spalding v. Vilas. This is true even when the acts done are in excess of their jurisdiction, provided it appear that this want of jurisdiction is not clear and unmistakable. Where, however, authority is clearly usurped, action will lie.[37]

§ 628. Power of the Supreme Court to Enforce a Judgment against a State.[38]

Fortunately, it has never happened that a State has persisted in a refusal to obey a decree rendered against it by the Supreme Court.

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[34] *Amer. and Eng. Encyc. of Law,* XIX, 504.

[35] *Cases on the Law of Officers,* p. 519, note.

[36] 161 U. S. 483.

[37] Bradley v. Fisher (13 Wall. 335); Voorhees v. Jackson (10 Pet. 449); Hine v. Morse (218 U. S. 493); Fauntleroy v. Lum (210 U. S. 230).

[38] For interesting discussions of this subject see the following articles: "Enforcement of Judgments Against a State" by Joseph R. Long in 4 *Virginia Law Review,*

However, in the long controversy between the State of Virginia and the State of West Virginia with reference to the payment by West Virginia of the proportion of the public debt of Virginia assumed by West Virginia at the time of its separation from Virginia and assumption of a status as a separate State, the obedience of West Virginia was so long delayed, and disobedience so definitely threatened, that it became necessary for the Supreme Court to consider what its powers in the premises were, and what its policy should be.

It has already appeared that, in appropriate cases, the court has issued injunctions to State officials, and, in boundary disputes has awarded to individual States jurisdiction over areas claimed by other States. Disregard of these injunctions would undoubtedly have been followed by proceedings in contempt, and the executive branch of the Federal Government would presumably have given armed assistance, if required, in order to enable the States to which disputed territory was awarded to exercise political jurisdiction over such territory, had the States adversely affected attempted to continue to exercise authority thereover. And, in the next chapter, it will appear that in numerous cases suits against individual State officials to compel or prevent action upon their part or to obtain damages because of actions upon their part under color of official authority have been entertained by the Federal courts upon the ground that such suits were not against the States themselves, and, therefore, were not prohibited by the Eleventh Amendment. These suits were maintained upon the ground or theory that the State officials involved had no right under any valid State law, to do that which they had done or which they threatened to do or to refuse to do. In the suit of Virginia against West Virginia, which, in one form or another, was repeatedly before the Supreme Court, the issue finally

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157; "The State as Defendant under the Federal Constitution" by William C. Coleman (now Federal District Judge) in 31 *Harvard Law Review*, 210; and "Coercing a State to Pay a Judgment: Virginia Versus West Virginia," by T. R. Powell, in 17 *Michigan Law Review*, 1.

An instance in which a State has sought to prevent the enforcement of an order of the Supreme Court is that of the State of Pennsylvania with regard to the decree in United States v. Peters (5 Cr. 115). In that case, service of attachment having been resisted by the State militia which had been called out by the Governor of the State under authority of the legislature of the State, the Federal marshal appointed a day for the service of the writ and summoned a *posse comitatus* of two thousand men to assist him. The Governor then appealed to the President of the United States, who refused to intervene, whereupon the State ceased to resist the enforcement of the decree and its legislature appropriated the money for its satisfaction.

In the case of Worcester v. Georgia (6 Pet. 515) the Supreme Court failed to secure an enforcement of the decree it had issued against State officials, but this was due not to incompetence of the court, but to the refusal of the President of the United States to lend executive aid for the enforcement of the decree that had been entered.

narrowed itself down to whether the court was competent to order State officials, as such, to perform acts which their States had not directed them to perform.

It is not necessary to go into details with reference to the suit of the State of Virginia against the State of West Virginia. It is sufficient to say that a decree was finally entered by the Supreme Court for the payment of a large sum of money by West Virginia to the State of Virginia.[39] This was not the first instance in which such a decree had been sought or entered against a State. In United States v. North Carolina,[40] the court, without objection upon the part of the defendant as to jurisdiction, had entertained a suit at the instance of the United States against the State of North Carolina to recover interest on certain bonds of that State, but, deciding the case on its merits, the State was held not liable, and, therefore, no question of enforcing a decree for the payment of money by the State arose. In United States v. Michigan,[41] also, suit was brought for an accounting, and, the demurrer of the defendant having been overruled, leave to answer was given, with the statement that, if no answer were made, a judgment in favor of the United States should be entered. However, the suit was later dismissed at the instance of the Solicitor General of the United States,[42] and, therefore, no question of enforcement of a money judgment arose.

In South Dakota v. North Carolina [43] the plaintiff sued to compel payment by the defendant of certain of its bonds which were secured by a mortgage of railroad stock owned by the State. Judgment was awarded the plaintiff and an order of foreclosure entered, directing that, if the judgment were not paid, the railroad stock should be sold at public auction on a specified date, after due advertisement, at the east front door of the capitol building at Washington. The day before the date arrived the defendant State paid the judgment.

In this case the problem of enforcing a money judgment against a State was greatly simplified by reason of the fact that there was property of the State not directly used for a public or governmental purpose which could be sold under order of the court for the payment of the judgment, and, therefore, unless there should not be realized from this sale a sum sufficient for that purpose, it would not be necessary to take further action. But there was the possibility that this necessity might arise, and, therefore, the court felt obligated to consider the general question as to the competence of the court to enter a judgment against the State which would, normally, be followed by the issuance of a writ of execution of some sort against the State. That the court had the power to issue such a writ was strongly intimated. Thus stood the question when, in 1915, the court entered a judgment for the payment of more than twelve millions of dollars by the State of West Virginia to the State of Virginia due upon an agreement made by the former State at the time it separated from the latter State, but for the payment of which no specific property or revenues of the State had been pledged, and which, as in the case of South Dakota v. North Carolina, might be attached and sold under a writ of execution.

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[39] Virginia v. West Virginia (238 U. S. 202).

[40] 136 U. S. 211.

[41] 190 U. S. 379.

[42] 203 U. S. 601.

[43] 192 U. S. 286.

Space will not permit a discussion of the possible ways in which this judgment might have been executed against the State of West Virginia, had it been necessary to do so. It is sufficient to say that the Supreme Court declared, in unequivocal language, its right to order such execution, but that such action became unnecessary by reason of the satisfaction of the judgment by West Virginia.[44]

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[44] For a discussion of the possible means by which, had it become necessary, the judgment might have been executed, see the author's *The Constitutional Law of the United States*, Vol. III, Chapter LXXIX.

CHAPTER LXVIII

IMPEACHMENT

§ 629. Constitutional Provisions.

The constitutional provisions for impeachment are contained in the clauses cited in the footnote.[1]

It is to be observed that the Constitution makes no mention as to what persons shall be subject to impeachment. According to English precedent all citizens are subject to impeachment, and it was at first asserted by some that the same is true in this country. The limitation of impeachment to the President and the Vice-President and to civil officers of the United States would, however, seem to be implied in the provision that these persons shall be removed from office on impeachment, and that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold office under the United States, and it is now generally agreed that only civil officers may be impeached.

§ 630. Who Are Civil Officers.

Military officers are not subject to impeachment. No attempt has ever been made to impeach any officer of the army or navy, and, therefore, there have been no pronouncements upon this point. But there has been no question as to this doctrine.

Members of Congress are not officers of the United States, not being commissioned by the President. This point was made at the time of the impeachment of Senator Blount, a resolution to the effect that he was an officer being negatived by a vote of fourteen to eleven.

In the case of the impeachment of Secretary of War Belknap, the issue was raised whether a civil officer, in anticipation of impeachment, may by resignation escape from liability to trial by the Senate. By a vote of thirty-seven to twenty-nine, seven not voting, it was held that the jurisdiction of that body had not been ousted by the resignation and by a later vote it was held that for this decision a two-thirds approving majority was not needed. And it may be noted that, in general, it has been held that the constitutional requirement as to the majority needed for conviction applies only to the final votes upon the question of guilt.

§ 631. For What Offences Impeachment Will Lie.

The constitutional provision is that impeachment may be had for "treason, bribery, or other high crimes or misdemeanors."

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[1] Art. I, § 2, Cl. 5; Art. I, § 3, Cl. 6; Art. I, § 3, Cl. 7; Art. II, § 2, Cl. 1; Art. II, § 4.

The terms "treason" and "bribery" require no definition. Treason is, indeed, defined in the Constitution itself, and the offence of bribery is sufficiently definite and well known. To the term "high crimes and misdemeanors," practice has given a broad meaning that brings within its connotation offences not penal by Federal statute. In the first four impeachment trials not a single charge rested upon a statute, and the same was true of some at least of the articles in most of the other trials.

It would also seem to be established that the offence charged need not be one committed in the discharge of official duties.

Speaking before the American Bar Association in 1913, Chief Justice Taft, said: "Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed is misconduct involving bad faith or wantonness or recklessness in his judicial action or in the use of his official influence for ulterior purposes. . . . By the liberal interpretation of the term 'high misdemeanor' which the Senate has given, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit."

In the most recent impeachment trial, that of District Judge English in 1926–1927, none of the charges upon which the impeachment was based was of an indictable character: they related to tyrannical and abusive use of his judicial power, to partiality and favoritism (especially to one Charles B. Thomas, his referee in bankruptcy, to whom Judge English was under heavy financial and other obligations), and, in general, to misbehavior in office.

In the case of Circuit Judge Archbold who was impeached and found guilty by the Senate in 1912 it was held that he could not be impeached upon the ground of acts done by him while District Judge.

§ 632. The Senate as a Court in Impeachment Proceedings.

The Senate, when trying impeachments, sits not as a legislative but as a judicial body.[2] This is important, since, sitting as a court, the Senate is under at least a moral obligation to follow, as near as may be, judicial modes of procedure. This, however, does not obligate it to abide by all the technical rules as to the admissibility of evidence and other technical rules which govern in the ordinary courts of law. Thus, in general, the Senate has accorded to the accused the constitutional rights that he could claim in ordinary criminal proceedings, such as the right to assistance of counsel, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, exemption from being compelled to be a witness against himself, etc.

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[2] *Cf.* "Federal Impeachments" by Alec. Simpson, Jr., in 64 *University of Pennsylvania Law Review*, 651, 667ff.

It is scarcely necessary to say that the proceedings and determinations of the Senate when sitting as court of impeachment are not subject to review in any other court.

The Chief Justice, when pre iding in trial of the President, has the same right to vote as has the Vice-President in other cases.

§ 633. Effect of Dissolution of Congress.

Whether or not the dissolution of the House preferring the impeachment operates to terminate the charges made has not been determined, the occasion for the determination not having arisen. Reason and analogy with ordinary criminal proceedings and with English practice would seem to answer the question in the negative.

§ 634. Punishment.

It is constitutionally provided that conviction upon impeachment must result in removal from office. To this may be added disqualification to hold and enjoy in the future any office of honor, trust, or profit under the United States. Where a criminal offence has been committed the party convicted is still liable and subject to indictment, trial, judgment and punishment according to law.

The power of the President to grant reprieves or to pardon does not extend to cases of impeachment.

CHAPTER LXIX

THE ELECTION OF THE PRESIDENT AND VICE-PRESIDENT

§ 635. The Executive Department.

The President and Vice-President are the only Federal executive officers for whose selection and functions the Constitution makes direct provision, unless, indeed, one includes the Senate to which is intrusted participation in the executive functions of appointments and approval of treaties. That certain great executive departments should be legislatively established was taken for granted, as shown, for example, in the provision that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices;" and that the appointment of inferior officers may be by Congress vested in the "Heads of Departments." From time to time these great executive departments, as well as certain "commissions" and other executive bodies not falling within any one of the "departments," have been created. The description and organization of these bodies does not fall within the scope of a treatise on constitutional law. We shall be concerned, however, with the manner in which all these executive departments are integrated into one great system with the President as its head and the extent of the directive power which the President may exercise over the civil and military service, and which the higher executive officers may exercise over their subordinates.

In the present chapter will be considered the qualification for the Presidency and Vice-Presidency, and the constitutional provisions governing the selection of persons to fill these offices.

§ 636. Appointment of Presidential Electors: Plenary Powers of the States.

The Constitution provides that "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States shall be appointed an elector."

It will be observed that the Constitution gives complete power to the States in the selection of presidential electors. The provision is that each State shall appoint in such manner as the legislature thereof may direct. There is no requirement as to their election by the people.

As a matter of fact during the early years under the Constitution in many of the States presidential electors were not elected at all, but appointed by the legislatures, and this practice did not wholly disappear until quite recently. South Carolina practiced legislative appointment until 1860, and Colorado appointed in this manner in 1876. At the present time, in all the States, the electors are chosen by popular ballot on a general ticket. It is, however, within the power of the States to provide for their election by districts, and this was done in Michigan in 1892. The constitutionality of this law was questioned in the Supreme Court of the United States, but was upheld by that tribunal in McPherson v. Blacker.[1]

The States having plenary power over the appointment of electors may make provision by law for the contingency of an elector dying between the date of his appointment and the time for the casting of his vote, or by sickness or accident being prevented from casting his vote.

§ 637. Original Provision of the Constitution as to Election of President and Vice-President: Inadequacy of.

According to the original provision of the Constitution the electors might vote for two persons without indicating which was their choice for President, and which for Vice-President. The person having the greatest number of votes was to be President, if such number were a majority of the whole number of electors appointed; and if there were more than one person having such majority, and having an equal number of votes, the House of Representatives was authorized by ballot to choose one of them for President. If no person had a majority, the House was to choose the President from the five highest in the list.

When so choosing the House was to vote by States, the representation from each State having one vote. In every case, after the choice of President, the person having greatest number of votes was to be declared Vice-President; and if there should remain two or more having equal votes, the Senate was to choose them by ballot.

§ 638. Twelfth Amendment.

The inadequacy of the original constitutional provisions for the election of the President and Vice-President early became manifest. John Adams became Vice-President in 1796 though he did not receive half the votes. In 1800 Jefferson and Burr received the same number of votes, and each a majority. There was no question, however, that the electors desired that Jefferson should be President and Burr Vice-President; but, had it not been for the patriotism of Hamilton and a few other Federalists, Burr would have been selected President though he had not been the choice of probably a single elector for that office.

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[1] 146 U. S. 1.

This experience was sufficient to lead in 1804 to the adoption of the Twelfth Amendment in substitution for Clause 3 of Section 1, of Article II.

§ 639. Counting the Votes.

With reference to the action of the Houses of Congress, after the selection of electors has been certified to them, the Twelfth Amendment, copying the language of the original provision of the Constitution, declares that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

The meaning of the last four words has been shrouded in doubt, and this doubt came very near to leading to serious consequences in 1876–1877. No declaration, it is to be observed, is made as to who shall do the counting, and therefore, who shall determine what votes shall be counted in case there is question as to their regularity or correctness. In 1876, as is well known, there were enough votes, the validity of which was contested, to determine the election. Upon the part of the Republicans it was claimed that the Vice-President (a Republican) should do the counting. The Democrats, however, asserted that the two Houses voting separately should perform this duty. As the Democrats were then in control of the lower House, and the Republicans of the Senate, this would have meant a deadlock. The *impasse* was finally broken, as is well known, by the very doubtful constitutional expedient of a special electoral commission to which all disputed cases should be submitted, the Congress being pledged to be guided by its decisions.

§ 640. Law of 1887.

By a law of February 3, 1887,[2] the whole matter of the election of the President is attempted to be regulated. By the first section, the second Monday in the January succeeding their appointment is fixed for the meeting of the electors and the giving of their votes. The postponement from the date formerly in force, namely, the first Wednesday in December, is to give the States full opportunity to determine any questions that may arise with reference to the appointment of their respective electors.

The second section of the act declares: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for the final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determinations shall have been made at least six days before the time fixed for the meeting of the electors, such determinations made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

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[2] 24 Stat. at L. 393. For a valuable criticism of this act see Dougherty, *The Electoral System of the United States.* See also the author's *Constitutional Law of the United States,* Vol. III, §§ 944, 945.

The effect of this section is, it will be seen, not to delegate to the States the counting of the electoral votes, but to determine what the two Houses of Congress, acting concurrently, will, under certain circumstances, consider conclusive evidence as to the regularity of the selection of the electors whose votes they are to count.

The act goes on in Section 3 to provide that the executive of each State shall, under the seal of the State, transmit to the Secretary of State of the United States a certificate showing what electors have been appointed, the votes cast for them, and, where there has been a controversy or contest, the manner in which settled. These certificates the Secretary of State is to publish in some newspaper, and at their first meeting send copies thereof to the two Houses of Congress. Each elector is also to be supplied with the same certificate, in triplicate, under the seal of the State. As determined by a previous law, one of these copies is to be sent by messenger to the President of the United States Senate at Washington, D. C., one to be forwarded to him by mail, and the third delivered to the judge of the district in which the electors assemble to cast their vote.

Sections 4, 5 and 6 of the law regulate the counting by Congress of the electoral votes as reported by the State.

The final Section (7) provides that the joint meeting of the two Houses "shall not be dissolved until the count of electoral votes shall be completed, and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of each House, not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall have not been completed before the fifth calendar day next after such meeting of the two Houses, no further or other recess shall be taken by either House."

§ 641. Presidential Succession.

The Constitution provides that: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

§ 642. Act of 1792.

The act of March 1, 1792, relative to the election of the President and Vice-President also fixed the succession in case of the death, removal, resignation, or disability of these officers. It declared: "In case of removal, death, resignation or disability both of the President and Vice-President of the United States, the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected."

These sections of the act of 1792, though open to both constitutional and political objections, remained in force until 1886. By an act passed that year the President *pro tempore* of the Senate or the Speaker of the House no longer appear in the line of succession, their places being taken by heads of the executive departments in a stated order.

The Constitution provides that the President and Vice-President shall hold office for the term of four years. The proper length of time and the propriety of forbidding re-election, were discussed in the Convention and the four-year period with eligibility to re-election finally agreed upon. Nothing is said in the Constitution as to the number of times the same person may be re-elected President, but, as is well known, the propriety of restricting to two the number of successive terms has become firmly rooted in the American mind.

§ 643. Presidential Inability.

A criticism that may be made both to the constitutional provision and to the acts of 1792 and 1886 is that the term "inability" to discharge the powers and duties of the presidential office is not defined. In the absence of a definition, who is to determine, and what conditions are to be held to create, an inability on the part of the President to perform his official duties? What is to be done in case the President is temporarily disabled by sickness or accident, or insanity? Who is to decide, and by what criteria when this disablement is so serious and so prolonged as to require the appointment of an acting President? For the two months preceding the death of President Garfield the country had no President able to perform the duties of the Chief Executive, and the same was substantially true during the long period of President Wilson's sickness prior to March 4, 1921.

The Constitution furnishes no direct answer to these questions. To the author it would seem that, under ordinary circumstances, the President himself may be trusted to recognize his own inability when it exists, and that, when he does declare this to be a fact, the Vice-President will therefore be justified in acting as President. If, however, it should happen that a President, though obviously unable to exercise the duties of his office, should refuse to recognize and declare this, or should be mentally unable to appreciate and declare his own inability, then the Vice-President should feel himself obligated to assume the office. It is to be assumed, however, that he would not take this serious step without previous consultation with, and approval by, the members of the President's cabinet and members of Congress. Having taken this step, its constitutionality could be tested in the courts by bringing before them the validity of his official acts, or of the acts of lower executive officials committed in reliance upon his orders. Thus, in last resort, the Supreme Court of the United States might be called upon to determine whether, in fact, there had existed an inability of the President which would constitutionally justify the exercise of presidential powers by the Vice-President. Similarly, should it happen that the disability of the President should prove to be temporary, and he should again claim the right to exercise the powers of his office, and the acting President should refuse, upon any ground, to yield to this claim, the question as to who is to be recognized as legally entitled to exercise the powers of the President could be determined by the courts involving the validity of the acts of either or both of the two claimants to the office.

§ 644. Does a Succeeding Vice-President Become President, or Is He Merely Entitled to Act as Such?

One further point regarding the succession of the Vice-Presidency needs to be mentioned. The language of the Constitution, strictly followed, would seem to point to, or at least render possible, the construction that upon the death, removal, resignation, or inability of the President, the Vice-President does not *become* the President, but simply that the powers and duties of the office "devolve" upon him. In Section 3 of Article I the Senate is authorized to choose a President *pro tempore* in the absence of the Vice-President "or when he shall exercise the office of the President of the United States," not when he shall become the President. This being so, in cases of disability of the President the Vice-President may by Congress be empowered not to *be* President, but to *act as* the President.

The uniform practice has been, however, since the time when Tyler took the oath of office on the death of Harrison, to consider the succeeding Vice-President as becoming the President. Under this practice, however, it may be asked, what, in case of disability, does the late President become, and how, upon removal of his disability, would he again become President? Does the Vice-President cease, for the time being, to be Vice-President, or does he hold both offices?

CHAPTER LXX

THE POWERS AND DUTIES OF THE PRESIDENT

By Section 1 of Article II, it is declared that "The executive power shall be vested" in the President. By Section 3 it is required that "he shall take care that the laws be faithfully executed." In ultimate resort, then, all Federal executive authority is in the President, and upon him lies the responsibility for seeing that the laws of the United States are faithfully executed, that is to say, that the armed and other forces of the Nation are, if necessary, employed to maintain in efficient operation the government of the United States over such districts as are under its sovereignty, and everywhere and under all circumstances to protect its officers in the performance of their duties.

In fulfilment of the responsibility thus constitutionally imposed, the President has, by necessary implication, the power to use all the specific powers conferred by the Constitution upon him. Chief of these is, of course, his authority as Commander-in-Chief of the land and naval forces of the Nation. He has also authority in many directions given him by statutes of Congress, with reference, for example, to the use of the militia, and to giving orders to subordinate executive officials.

Aside from these express powers, and those necessarily implied by them, the President has no authority to act.[1] That is to say, the obligation to take care that the laws of the United States be faithfully executed, is an obligation but confers in itself no powers. It is an obligation which is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer. At the time of the threatened resistance of the people of the Southern States to Federal Law in 1860, President Buchanan, under the advice of his Attorney-General, held himself practically powerless because of the lack of statutory authority to take the necessary steps. President Lincoln, upon his assuming office, gave a broader interpretation to existing laws conferring authority upon him, and Congress soon by statute further increased his powers.

§ 645. The President as Administrative Chief.

The functions of a chief executive of a sovereign State are, generally speaking, of two kinds—political and administrative. In different countries, with different governmental forms, the emphasis laid respectively upon each of these functions varies. In some, the powers and influence of the executive head are almost wholly political. In others, as for example Switzerland, the political duties of the executive are so fully under legislative control that the chief importance is upon the administrative side.

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[1] But see *In re* Neagle (135 U. S. 1). In this case the court came perilously near to holding, if in fact it did not actually hold, that the President has inherent executive power; that is, powers inherent in him as Chief Executive, and not as expressly given him by the Constitution, or implied from the powers expressly given, or constitutionally granted to him by Congress.

In the United States it was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose functions should, in the main, consist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate Federal administrative agents. The acts of Congress establishing the Department of Foreign Affairs (State) and of War, did indeed recognize in the President a general power of control, but the first of these departments, it is to be observed, is concerned chiefly with political matters, and the second has to deal with the armed forces which by the Constitution are expressly placed under the control of the President as Commander-in-Chief. The act establishing the Treasury Department simply provided that the Secretary should perform those duties which he should be directed to perform, and the language of the act, as well as the debates in Congress at the time of its enactment, show that it was intended that this direction should come from Congress. Furthermore, the Secretary is to make his annual reports not to the President, but to Congress.[2] In similar manner the Post-Office Department, when first permanently organized in 1794, was not placed under the control of the President. The act gives in detail the duties of the Postmaster General and there is no suggestion that in the exercise of these duties he is to be under other than congressional direction.

The constitutional power of Congress thus to assume direction of the administrative departments of the Government received the approval of the Supreme Court in Kendall v. United States.[3]

Despite this obvious original intention to confine the duties of the President mainly to the political field, the President has in practice become the head of the Federal administrative system. This has been due to two causes. In the first place the President's power to remove from office, a power which he may exercise at will, has easily enabled him to obtain administrative action even when he has not had legal power directly to command it. This was clearly shown in the episode of the removal of the bank deposits by Jackson. In the second place the practical necessities of efficient government have compelled Congress to place in the President's hands powers of administrative discretion, and have inclined the courts to uphold his orders whenever it has been possible to do so.[4]

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[2] *Cf.* Goodnow, *American Administrative Law*, 78.

[3] 12 Pet. 524.

Even where the President has not the power to command he has the constitutional right to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."

Acting under his constitutional obligation to take care that the laws be faithfully executed, the President may take such steps as are necessary and the laws permit, to compel the proper performance of their respective duties by Federal agents generally. This duty does not, however, make the President responsible for every act committed by a subordinate administrative official, nor, even where a duty is expressly laid upon him by the Constitution or by statute, is it necessary, or humanly possible for him, in every case, to perform the duty in person.[5]

In general the courts have recognized that the President acts through the chiefs of the Departments and that their acts are, in the view of the law, his acts. In proper cases, also, the acts of subordinate officials will be considered as the acts of a departmental head, and thus of the President.[6]

Where, however, from the nature of the case, or by express constitutional or statutory declaration, it is evident that the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else.[7]

The courts have laid down the general doctrine that where a power of supervision and direction is given to an administrative superior this power may be exercised either by way of direct order, or by entertaining appeals from the acts of subordinates.[8]

Generally speaking, it has been held that no appeal lies to the President from the heads of the great Departments at Washington. This is upon the ground that the acts of these administrative chiefs are held to be the acts of the President. It may be observed, however, that in the several States of the Union the heads of the administrative departments have, commonly, no powers of direction, and, therefore, that there is no general right of appeal to them.

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[4] See Macy, *Party Organization and Machinery in the United States;* Ford, *Rise and Growth of American Politics; Proceedings of the American Political Science Association,* I, 47, article by Prof. J. T. Young, "The Relation of the Executive to the Legislative Power."

[5] Williams v. United States (1 How. 290).

[6] Wilcox v. Jackson (13 Pet. 498); Jones v. United States (137 U. S. 202).

[7] Runkle v. United States (122 U. S. 543).

[8] Knight v. United States Land Assn. (142 U. S. 161); Orchard v. Alexander (157 U. S. 372).

§ 646. Administrative Decentralization in the States.

In general it may be said that the administrative systems of the States are much less centralized than that of the United States. As contrasted with the Federal system the governors have no general power of removal of public agents from office, nor are they given supervisory or directory power over the various administrative departments and boards of the State governments. Furthermore each of these several departments and boards is thus not only not integrated into a single system under a single head, but, not infrequently, each of them individually exhibits slight administrative integration.

§ 647. Increasing Integration of Federal Administration.

The Federal administrative system has exhibited a steady increase in integration. In the earlier years subordinate administrative officials were accustomed to act in individual cases without feeling themselves bound to consult the judgment of those higher in office, nor did they hold themselves necessarily bound by directions from such sources. The principle followed by them was that they, as well as those in higher position, derived their authority by direct grant from the Congress and were subject to control and direction only by that body or by the courts. The necessities of efficient government have, however, compelled Congress to place express power of control over their subordinates in the hands of administrative chiefs, and have persuaded the courts to recognize, whenever possible, the existence of these supervisory powers even where express statutory provision has not been made for their exercise.

The power of the President to control the institution and continuance of suits by the Attorney-General and his assistants may seem to some an improper one, but its existence has been recognized since the foundation of the government.[9]

§ 648. Information to Congress.

The constitutional obligation that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," has, upon occasions, given rise to controversies between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.

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[9] *Cf.* Atty. Gen. II, 482; United States v. San Jacinto Tin Co. (125 U. S. 273); United States v. Bell Tel. Co. (128 U. S. 315).

§ 649. The President's Control of Foreign Relations.

In the Chapter dealing with the treaty-making Power, the extent of the President's control of the foreign relations of the United States is fully considered.

§ 650. The President's Pardoning Power.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

This pardoning power, like the veto power, has given rise to very few constitutional questions. It will be seen that the power is limited to offences against the United States. Cases of impeachment are expressly excepted from its reach and we shall later consider whether it may extend to the remission of penalties imposed for civil contempts of court.

The effect of a pardon is to obliterate the offence, but it does not operate to impair the rights of others, as for example, to restore the offender's property which has been forfeited; [10] nor does it restore one *ipso facto* to a forefeited office.[11] Also, though the pardon takes away the guilt, it does not affect the *fact* of conviction of the crime, which fact may be later shown as bearing upon the offender's character.

The power to pardon includes the right to remit part of the penalty as well as the whole, and in either case may be made conditional. The power may be exercised at any time after the offence has been committed, that is, either before, during, or after legal proceedings for punishment.[12] General pardons, granting amnesty to classes of offenders, without naming them individually, may be granted.

The power is a purely discretionary one in the President, and therefore may not in any way be limited by Congress.[13]

Though Congress has thus no power to limit in any way the exercise of the pardoning power by the President, it may itself exercise that power to a certain extent, if exercised prior to conviction. Thus acts of amnesty have been held valid.[14]

The power to suspend sentence, it has been held, is by the common law inherent in the judicial power, and its exercise, therefore, would not be in conflict with the executive power to grant reprieves and pardons, even were that power considered exclusive.

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[10] Osborn v. United States (91 U. S. 474).

[11] *Ex parte* Garland (4 Wall. 333).

[12] *Idem.*

[13] *Idem.*

[14] Brown v. Walker (161 U. S. 591). As to remission of penalties by lower administrative officers, see Pollock v. Bridgeport Co. (114 U. S. 411). For the distinction between pardons and amnesties, see Burdick v. United States (236 U. S. 79).

§ 651. Pardons May Be Refused by Persons to Whom Tendered.

In Burdick v. United States [15] the interesting doctrine was declared that a pardon from the President to be effective must be accepted by the person to whom it is tendered, and, therefore, that an unaccepted pardon will not operate to destroy the privilege of a witness against self-incrimination, that is, that he may refuse the tendered pardon and refuse to testify on the ground that his testimony may tend to incriminate himself. This holding was based upon United States v. Wilson [16] in which the court declared that "a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

In Biddle v. Perovich [17] however, it was held that the President might, against the will of the person concerned, commute a death sentence to one of life imprisonment.

§ 652. Suspension of Sentences.

The power to suspend sentence, it has been held, is by the common law essentially a judicial power, and its exercise, therefore, is not in conflict with the executive power to grant reprieves and pardons, even were that power considered exclusive.

§ 653. Pardons for Contempts: Relation of, to Separation of Powers.

In *Ex parte* Grossman [18] it was held that the extent of the President's pardoning power should be determined by reference to the common law and to British institutions at the time the Constitution was framed and adopted, and that, so considered, the grant to the President of the power to pardon offences against the United States without qualification (except as to impeachments) was not to be construed as vesting him with authority to remit penalties imposed by courts for civil contempts. The distinction between civil and criminal contempts was emphasized, and the doctrine declared that, while the latter might be pardoned by the President, the former could not be.

§ 654. The Veto Power of the President.

The exercise by the President of the veto power has given rise to very few constitutional questions, and, where these have arisen, they have been considered, incidentally, elsewhere in this treatise.[19]

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[15] 236 U. S. 79.

[16] 7 Pet. 150.

[17] 274 U. S. 480.

[18] 267 U. S. 87.

[19] Chapter XXV.

§ 655. The Ordinance-Making Power of the President.

This power, which of recent years has become so important, will receive treatment in the chapters on "The Separation of Powers" and "The Delegation of Legislative Power." [20]

§ 656. The Amenability of the President to Compulsory Judicial Process.

As is elsewhere shown, for the performance of a purely ministerial act, a mandamus will lie to the heads of the great Departments of the Federal Government, and, *a fortiori*, to their subordinates. We have now to inquire whether the President, the Chief Executive of the nation, is, with reference to the performance of a purely ministerial act, similarly subject to compulsory judicial process. This question has several times been before the courts, and though not often directly passed upon, a negative answer has been uniformly indicated.

§ 657. Marbury v. Madison.

In Marbury v. Madison [21] the question was as to the issuance of a mandamus not to the President but to the Secretary of State. It was argued, however, that the Secretary acted as the agent of the President, and that the President, as Chief Executive, was not amenable to the writ. The court, in its opinion, held that the Secretary was, as to the action prayed for, subject to the writ, but conceded that in cases in which the Secretary was but carrying out the political or discretionary will of the President, the writ would not issue. In this case it will be remembered that the court finally refused to issue the mandamus to the Secretary on the ground that the provision of the act of Congress giving the original jurisdiction under which the suit had been brought was unconstitutional. President Jefferson, however, declared that had the mandamus been awarded, he would have considered it an infringement upon his executive rights and as such would have resisted its enforcement with all the power of government.

In Marbury v. Madison the court did not intimate what its position would be in case the performance directly by the President of merely ministerial duties was prayed.

§ 658. Aaron Burr Trial.

In the trial of Aaron Burr for treason the amenability of the President to a judicial process was brought directly into issue. Marshall, who was conducting the examination, issued, at the request of the defence, a *subpœna duces tecum* directing President Jefferson to appear and bring with him a certain letter to himself from General Wilkinson. Jefferson refused to appear or to bring the letter. That a compulsory process should be thereupon issued to the President does not appear to have been even considered, but upon a discussion as to whether the Attorney-General should permit the defence to have the examination of a copy of the letter which had been put into his, the Attorney-General's, possession, Marshall said: "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the court in consequence of his not having attended; notwithstanding the subpœna was awarded agreeably to the demand of the defendant, the court would, indeed, not be asked to proceed as in the case of an ordinary individual." [22]

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[20] For a comprehensive treatment of the subject see James Hart's *The Ordinance Making Powers of the President*, Johns Hopkins Press, 1925.

[21] 1 Cr. 137.

In another account of the same trial, the Chief Justice is reported to have said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of reasons for and against producing it he himself is the judge." [23]

§ 659. Head of Executive Department Acting for the President: When Amenable to Writ.

As was intimated in Marbury v. Madison, a chief of one of the executive departments, when acting under the direct orders of the President, with reference to a matter which has, by the Constitution, been placed within the discretionary or political control of the President, is not amenable to the authority of the courts; but when not so acting, he is, as to a purely ministerial matter, amenable to compulsory judicial process. This principle was well illustrated in the case of Kendall v. United States.[24] This was a case in which a peremptory mandamus was prayed and awarded to the Postmaster General commanding him to credit the petitioners with certain amounts which had been found due them from the United States by a decision of the Solicitor of the Treasury.

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[22] *Burr's Trial,* III, 37. Published by Westcott & Co., Washington City, 1807.

[23] *Burr's Trial,* II, 536. Hopkins & Earle, Philadelphia, 1808.

For further discussion of this subject, see Mississippi v. Johnson (4 Wall. 475), and Georgia v. Stanton (6 Wall. 50).

The same reason which has supported the immunity of the President from compulsory judicial process has, in several of the States of the Union, supported a similar immunity on the part of the Governor. The scope of this treatise will not permit, however, a discussion of this phrase of the question. For a discussion of this subject see the *University Law Review,* III, 335; *Mich. Law Review,* III, 631; *Columbia Law Review,* VI, 453.

[24] 12 Pet. 524.

CHAPTER LXXI

THE APPOINTMENT AND REMOVAL OF OFFICERS

§ 660. Constitutional Provisions.

The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

It is also provided that the President "shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," and that he "shall commission all officers of the United States."

§ 661. " Officer " of the United States Defined.

The definition of the term "officer" of the United States was considered in United States v. Germaine [1] and United States v. Mouat.[2] In the latter case the court said:

"What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in United States v. Germaine, 99 U. S. 508. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

The Constitution, it is seen, fixes absolutely the manner in which certain officers; namely, ambassadors, other public ministers and consuls, Judges of the Supreme Court, shall be nominated and appointed. The Constitution itself provides, in other clauses, for the selection of the

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[1] 99 U. S. 508.

[2] 124 U. S. 303.

President, the Vice-President, presidential electors, Senators, members of the House of Representatives, and the officers of the two Houses of Congress. In addition to these officers whose selection is thus constitutionally determined, it would appear that all other officers not properly to be styled "inferior" are to be nominated by the President and appointed by and with the consent of the Senate. The appointment of all other officers of the United States, not mentioned within the foregoing paragraph, is subject to regulation by law of Congress, at least to the extent that that body may determine whether they shall be appointed by the President with the approval of the Senate, or by the President alone, or by the courts of law or by the heads of the departments.

§ 662. Inferior Officers.

The Constitution does not define the term "inferior officers," but it would appear that in this class are included all officers subordinate or inferior to those officers in whom other appointments may be vested.[3] The point has never been squarely passed upon by the court since Congress has never attempted to vest the appointment of any but distinctively subordinate and inferior positions elsewhere than in the President by and with the consent of the Senate. Should it attempt to determine by law the appointment of heads of the great departments, or even of the heads of important bureaus and divisions and commissions, or even of important local officers, the constitutionality of the law would undoubtedly be subjected to judicial examination.

§ 663. Nominations.

With reference to the President's power of appointment it is to be observed that nominating, appointing, and commissioning to office are distinct acts.

The nomination is exclusively in the hands of the President. During the first years of the government the suggestion was several times made that the Senate might propose names for nomination to the President; but, whenever made, the suggestion was disapproved of as clearly not warranted by the Constitution. An appointment to office is not completed until signed by the President. Therefore, even after sending a nomination to the Senate and even after the approval of that body has been given, the President may, having changed his mind, refuse his signature to a commission. His signature having once been appended, however, the appointment is complete, and the delivery of the commission by the head of the appropriate executive department may be commanded by mandamus, provided, of course, a Federal court has, by statute, been granted jurisdiction to issue the writ. This was determined in Marbury v. Madison.[4]

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[3] Collins v. United States (14 Ct. of Claims, 569); United States v. Germaine (99 U. S. 508).

§ 664. Recess Appointments.

By Article II, Section 2, of the Constitution, the President is given the power "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

The only constitutional controversy which has arisen with reference to this provision is as to when a vacancy may be said to have "happened" during a recess of the Senate, and therefore to have furnished an opportunity for a Presidential appointment.

It has been contended that the constitutional provision regarding the granting of commissions by the President during recesses of the Senate does not apply when such vacancies occur while the Senate is in session, and which might, therefore, have been filled by the making of regular nominations by the President. The practice of a long line of Presidents, together with opinions of Attorney-Generals, support the view that this may be done. To the contention that such vacancies do not "happen" during the recess, the reply has been that the Constitution provision means "happen to exist" for any reason while the Senate is not in session.

§ 665. Creation of Offices.

All offices are created either by the Constitution itself, or by Congress. The President, therefore, has not the power to create an office by directing some person to perform certain functions. However, the President as well as other executive officials may, for their assistance in executing their official duties, employ persons to perform certain specific duties. These persons have, however, legally speaking, no official powers, that is, they have no authority to issue orders to others, and for compensation for their services they must look either to contingent funds, the expenditure of which is placed in the discretion of the department employing them, or to a subsequent appropriation by Congress.

§ 666. Appointing Powers of Congress.

The Congress has no appointing power, beyond the selection of its own officers. It may create an office but not designate the one to fill it.[5]

It has been held that Congress may authorize a particular person or official to perform a specific act, though it may not create an "office" for that person, in the sense that he is made an officer of the United States or entitled to any emolument or profit.[6]

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[4] 1 Cr. 137.

[5] *Cf.* United States v. Ferreira (13 How. 40); Shoemaker v. United States (147 U. S. 282).

§ 667. Power of Congress to Prescribe Qualifications for Officers of the United States.

It is clear that, when Congress prescribes the qualifications that must be possessed by persons who are to be nominated for office by the President, the President's discretionary right to make such nominations is, to such extent, circumscribed. However, practice, which has been acquiesced in since the beginning of the Government, has established the doctrine that such qualifications may be prescribed provided they are not so minute and special as, in effect, to leave to the President no real freedom of choice and to narrow the possible nominees down to particular individuals and thus make them, in effect, the nominees of Congress itself.

It is a rather surprising fact that there are no clear and direct adjudications of the Supreme Court, or, indeed, of the lower Federal courts, as to the constitutionality of this congressional practice. However, in Myers v. United States[7] we have the following *dictum* by Chief Justice Taft: "It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided, of course, that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."

§ 668. Civil Service Requirements.

The question has been at times raised as to the constitutional power of Congress, while providing for the appointment of officials by the President, or by heads of departments, to require that the appointees shall be selected from certain classes of persons, namely, those who have satisfied specified educational and other tests applied by the Civil Service Commission. Though the courts have never had occasion to pass upon this point, the constitutionality of the provision would seem to be fairly certain. The same sort of rules have long been established and followed with reference to appointments in the Army and Navy, and the decisions of the State courts support the practice as to the appointment of State officials.

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[6] See Kentucky v. Dennison (24 How. 66), in which it was declared that Congress might authorize, though it could not compel, State officers to perform certain duties with reference to the interstate extradition of fugitives from justice.

[7] 272 U. S. 52, 128.

§ 669. Appointing Power May Be Vested Only as Provided by the Constitution.

The Congress may not vest the appointment of officers elsewhere than, as permitted by the Constitution, in the President alone, the President and the Senate, the courts, or the heads of departments.[8]

§ 670. The Power to Remove from Office.

The Constitution makes no direct provision for the power to remove Federal officers from their offices, and, as a result, there has been continued controversy as to where, with reference to specific officers or classes of officers, this power of removal is constitutionally vested, or where it may be vested by congressional statute. The recent case of Myers v. United States [9] has tended to determine some of these doubts, but, as will presently appear, has not disposed of all of them.[10]

It is established that the power to appoint and remove is an executive and not a legislative function, and, therefore, that Congress has no authority in the premises except possibly with regard to inferior officers, whose appointment is vested in the President alone, in the courts of law, or in the heads of departments.[11]

Since the beginning of the Government it has been agreed that the power to remove, in the absence of any constitutional or statutory provision to the contrary, is to be deemed to be implied by, and included within, the right to appoint.[12]

With reference to ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for, and which are established by law, the right to appoint is vested conjointly in the President and Senate.[13] It might seem, therefore, that the power to remove should be regarded as thus conjointly vested. In fact, however, it has been held that this power of removal is vested exclusively in the President. The fact that this power is possessed by the President, in the absence of any congressional provision to the contrary, was, from the first, recognized, but it was not until the decision of the Myers case, in 1926, that it was judicially declared that it is not constitutionally competent for Congress to deny to the President the right to remove from office, without the advice and consent of the Senate, officers appointed by him with that advice and consent.

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[8] Ekiu v. United States (142 U. S. 651).

[9] 272 U. S. 52.

[10] The author will not attempt in the paragraphs which follow to determine the much disputed question as to the conclusions to be reached from the debate in the First Congress with regard to the President's inherent or constitutional right to remove, or to trace the doctrines deducible from legislation and executive practice since that time, for these questions relate rather to the consistency of the conclusions which have been reached by the Supreme Court as tested by previous practice or precedent, than to the effect of the conclusions themselves. The author will, then, confine his discussion to the propositions which may be said to have been judicially determined by the Supreme Court, especially in the Myers case.

[11] "Our conclusion . . . is that Article II grants to the President the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals except only as granted therein to Congress in the matter of inferior offices." Majority opinion in Myers v. United States (272 U. S. 52, 163).

[12] The right to appoint Federal Judges does not carry with it the right to remove, since it is elsewhere specifically provided in the Constitution that they shall hold office during good behavior.

The question whether the President was vested by the Constitution itself with the power, independently of the Senate, to remove officers appointed by him by and with the advice and consent of the Senate was raised and discussed at length in the First Congress, but with a result that left opportunity for a wide division of opinion as to just what were the premises upon which the final vote was based.

In the case of Parsons v. United States [14] the question was presented whether the President had the power to remove from office, before the expiration of his term, a district attorney who had been duly appointed under an act of Congress which provided that "District Attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates." The court held that, viewing the statute in the light of legislative and executive practice for more than a hundred years, it was not to be believed that Congress had intended, by fixing the term of office to four years, to limit the power of the President to remove before the expiration of that time.

The Tenure of Office Acts of 1867 and 1869, which were repealed in 1886, did, in express terms, limit the President's power of removal, but these acts were passed under peculiar conditions of strife between Congress and the President, they never were brought before the court for the determination of their constitutionality, and, as will be seen, the present opinion is that the acts were unconstitutional.

In Reagan v. United States [15] it was impliedly held, however, that an officer appointed by the President by and with the advice and consent of the Senate under an act of Congress, is entitled to notice and a hearing before removal if by statute causes for removal are specified, or the term of office is for a given period. In this case the courts held that in fact Congress had not affirmatively specified any causes of removal, but, the court intimated, that, had it done so, notice and hearing would have been necessary before removal.

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[13] Unless otherwise provided by Congress with regard to inferior officers.

[14] 167 U. S. 324.

[15] 182 U. S. 419.

In Shurtleff v. United States [16] the President's power of removal from office was again carefully considered. This case did not require the court to determine whether the President's power of removal was constitutionally exempt from the control of Congress, inasmuch as it held, by a rather strained construction, that, when a Federal officer has been removed from office by the President without notice or an opportunity to defend, it will be presumed that the removal was made from other causes than those specified by Congress, and that this being so, the officer so removed is not entitled to that notice and opportunity to defend to which he would have been entitled had his removal been based upon one of the causes specified by Congress as justifying removal. And, furthermore, it was necessarily held that the specification by Congress of certain causes for which removal might be made, was not to be construed as declaring, or attempting to declare, that removal should not be made for such other reasons as to the President might seem sufficient.

In Wallace v. United States [17] a lieutenant colonel had been dismissed by an order of the President otherwise than as provided by law, namely, in pursuance of the sentence of a court-martial. It was contended that, inasmuch as this officer had been appointed by and with the consent of the Senate, he could not be legally removed except as provided by law or with the approval of the Senate. The court, however, held that, inasmuch as the Senate had approved the appointment of a successor to the removed officer, its consent, if necessary, could be deemed to have been given to the removal. In the course of its opinion the court, after reviewing various legislative acts, including the Tenure of Office Act of 1867, fixing or attempting to fix the conditions under which both civil and military officers might be removed from office, said: "While thus the validity and effect of statutory restrictions upon the power of the President alone to remove officers of the Army and Navy and civil officers have been the subject of doubt and discussion, it is settled [18] that the President, with the consent of the Senate, may effect the removal of an officer of the Army or Navy by the appointment of another to his place, and that none of the limitations in the statutes affect his power of removal when exercised by and with the consent of the Senate. Indeed, the same ruling has been made as to civil officers." [19]

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[16] 189 U. S. 311.

[17] 257 U. S. 541, 545.

[18] Citing McElrath v. United States (102 U. S. 426); Blake v. United States (103 U. S. 227); Keyes v. United States (109 U. S. 336); Mullan v. United States (140 U. S. 240).

[19] Citing Parsons v. United States (167 U. S. 324).

§ 671. Myers v. United States.

In Myers v. United States [20] for the first time the Supreme Court was called upon squarely to decide whether the President was constitutionally invested with a power to remove officers appointed by him, whether superior or inferior, which could not be limited by congressional provisions. The essential facts in this case were these: One Myers had been appointed, by and with the advice and consent of the Senate, to a postmastership of the first class under an act of Congress which provided that "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." [21] Myers was removed from office by presidential order, while the Senate was in session, and that body did not give its consent to the removal, either expressly or impliedly, by confirming the appointment of a successor to the office from which Myers had been removed. Myers, claiming that his removal had been illegal and therefore void, sued in the Court of Claims for salary due him for the remainder of his term of office.

As stated by Justice Brandeis in his dissenting opinion, the narrow point which the court was called upon to decide was: "May the President, having acted under the statute so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?" The court answered this question in the affirmative.

Space will not permit even a résumé of the arguments employed by the Supreme Court in reaching this decision, interesting as that reasoning is not only to the student of constitutional law but to those interested in the art of government. It is, however, necessary to point out that the court did not wholly deny to Congress authority with regard to fixing the conditions under which, and the modes by which, removals from Federal offices may be made. The Constitution expressly declares that Congress may provide that the appointment of "inferior" officers may be made by the President alone, by the courts of law or by the heads of departments. And, as will later appear, it had been earlier judicially held, and this holding was referred to with approval in the Myers case, that, when Congress, in the exercise of the discretion thus vested in it, places the appointment of inferior officers in other than the President alone, or in him conjointly with the Senate, it (the Congress), may limit and regulate the removal of such officers.

It might seem that, if this congressional right to regulate the removal of inferior officers may properly be deduced from the expressly given power to provide for their appointment, it would be a right of regulation that would apply to cases in which Congress sees fit to vest the appointing power in the President alone or in him with the advice and consent of the Senate, as well as when their appointment is by Congress vested in the courts of law or the heads of departments. In fact, however, the Myers case decides that this is not so, for the reason that to decide otherwise would be to allow the legislature to infringe upon the executive power which, in general and unqualified terms, is vested by the Constitution in the President. In other words, the constitutional power of the President to remove is declared to be derived not only by implication from his expressly given power to appoint with reference to certain specified officers, but also from the general grant of executive power to him by the first clause of Section 1 of Article II of the Constitution, and from the obligation imposed upon him by Section 3 of the same Article to "take care that the laws be faithfully executed."

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[20] 272 U. S. 52.

[21] 19 Stat. at L. 80.

In order to reach this conclusion the court gave to the executive power a significance and an extent which, prior to the Myers case, it had not previously expressly given to it. In the first place it is emphasized that while the legislative powers given to Congress are specifically enumerated, and its implied powers limited to the making of laws which are necessary and proper for carrying into execution the powers thus given and other powers vested by the Constitution in the Government of the United States or in any department as officers thereof, the executive power is granted in general terms, without qualification or enumeration of specific powers, to the President. Hence, it was argued, that the power, which includes as one of its constituent elements the power to remove executive officials, is an unlimited and unlimitable one, except insofar as the Constitution may expressly otherwise provide.

The power of Congress to regulate the removal of inferior officers whose appointment it has vested in the President alone, that is, without the necessity of confirmation by the Senate, would appear to be still uncertain. There have been no direct adjudications upon this point, and, in the Myers case, the court said: "Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to congressional legislation than before is a question this court did not decide in the Perkins case. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it." [21a]

[21a] 272 U. S. 52, 161, 162.

§ 672. Power to Remove Officers Whose Appointment Is Vested by Congress in the Courts of Law or the Heads of Departments.

There appears to be a consistent line of cases holding that where Congress has seen fit to vest the appointment of officers in the courts of law or the heads of departments, it may also provide that they may be removed from office by such courts or departmental heads.

In United States v. Perkins[21b] was involved the power of the Secretary of the Navy to dismiss from office a cadet engineer who had not been court-martialed, and who had been appointed by the Secretary under a law which provided that cadet engineers should not be dismissed from office except in pursuance of a sentence of a court-martial. The court held that he could not be removed without a court-martial. The Court said: "The head of a Department has no Constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto." [22]

It is thus seen that it is established that Congress may vest the removal power in department heads when the appointments are vested in them. There possibly is still unsettled, however, the question whether there remains also in the President a power to remove such officers, derived from the Constitution, of which power Congress cannot deprive him.

It is perhaps worth noting that, even if it should be held that the power of the President to remove inferior officers may be defeated by vesting their appointment in courts of law or in the heads of departments, it would still be possible for him, as a practical proposition, with regard to appointments by heads of departments, to secure the removal of such appointees by the same means which President Jackson employed to secure the removal of the bank deposits. This pressure could not be exerted upon the Federal courts, since their judges cannot be removed by the President.

§ 673. May Congress Provide That Congress Itself, or Either House Thereof, Shall Have the Power to Remove, or to Participate in Removals?

There is no direct judicial decision upon this point, but the reasoning in the Myers case would indicate that this may not be done, and, in fact, there is the following direct statement in the opinion to that effect: "The court never has held nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers." [23]

[21b] 116 U. S. 483.

[22] *Cf. Ex parte* Hennen (13 Pet. 230).

§ 674. Amenability to Removal of the Comptroller General and the Assistant Comptroller General under the Budget and Accounting Act of 1921.

Under the Budget and Accounting Act of 1921 provision is made for a Comptroller General of the United States and an Assistant Comptroller General who are to be appointed by the President with the advice and consent of the Senate. With regard to the terms of office and removability of these officials, Section 303 of the act provides that they shall hold office for fifteen years and that they "may be removed at any time by Joint Resolution of Congress [24] after notice and hearing, when in the judgment of Congress the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any Comptroller General or Assistant Comptroller General removed in the manner herein provided shall be ineligible for reappointment to that office. When a Comptroller General or Assistant Comptroller General attains the age of seventy years, he shall be retired from office."

This act was approved by President Harding without raising any question as to the constitutionality of the provision which has been quoted. It is, however, perfectly clear that, under the decision of the Supreme Court in the Myers case, this provision is unconstitutional unless it can be held that the Comptroller General and Assistant Comptroller General are not "executive" officers of the United States. The fact is, however, that the court in its opinion, seemed to take care to limit to "executive" officers the application of the doctrine it declared as to the lack of constitutional power upon the part of Congress to control the power of removal of the President with reference to officers appointed by him alone or by and with the advice and consent of the Senate.

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[23] 272 U. S. 52, 161. The excepting clause to which reference is made is of course that which provides that Congress may vest the appointment of inferior officers in the President alone, in the courts of law or in the heads of Departments.

[24] The Budget Bill which was vetoed by President Wilson on the ground that it would unconstitutionally limit his constitutional power of removal had provided that the Comptroller General and Assistant Comptroller General could be removed only by a Concurrent Resolution of Congress, that is, by a Resolution which does not require presidential approval, and which therefore is not subject to possible presidential veto.

The argument that the Comptroller General and the Assistant Comptroller General are not "executive" officers, is based upon the ground that their duties relate wholly to guaranteeing that the directions of Congress with reference to the expenditure of, and the accounting for, moneys appropriated by Congress are in accordance with the declared will of Congress, and that, as so viewed, they are agents of Congress, and, therefore, legislative rather than executive officers.[25]

It is to be noted that Ex-Solicitor General Beck, who was of counsel for the United States in the Myers case, has since expressed the opinion that the ruling in that case does not necessarily cover an officer such as the Comptroller General. Analyzing the scope of the decision in that case he has said: "Moreover, the decision does not decide whether or not there may not be a class of officers who are not in strictness executive officers. For example, the Federal Trade Commission is chiefly a fact-finding commission, to aid Congress in formulating legislation. The Interstate Commerce Commission is a fact-finding commission which discharges the so-called legislative duty of imposing reasonable rates upon carriers. The Comptroller General is regarded as the special representative of Congress in seeing that its appropriations are faithfully disbursed. Can the President remove such *quasi*-legislative officials? This [Myers] decision is not conclusive upon this point, and properly so; for no case of this character was before the court." [26]

§ 675. Removal of Army and Navy Officers.

The act of July 13, 1866,[27] which is now in force, provides that "no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." [28] The question has been raised whether the decision of the Supreme Court, in the Myers case, holding unconstitutional the act of July 12, 1876,[29] with reference to the removal of postmasters may not be used to support a holding that the law which has been quoted regarding the dismissal of military and naval officers is also unconstitutional.[30]

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[25] Generally, with regard to status and duties of the Comptroller General, see W. F. Willoughby's *The Legal Status and Functions of the General Accounting Office of the National Government.* This volume is one of the "Studies in Administration" issued by the Institute for Government Research (Johns Hopkins Press, 1927).

[26] *New York Times,* November 7, 1926.

[27] 14 Stat. at L. 90.

[28] This provision appears also in the 118th Article of War, and is included in the act of June 4, 1920 (41 Stat. at L. 759).

[29] 19 Stat. at L. 80.

[30] See article "The Power of the President to Remove Officers of the Army" in 15 *Georgetown Law Journal,* 168.

It may be noted that Congress has also made provision for the "retirement" of military and naval officers on account of superannuation or disablement, and for their discharge as "Class B" officers, upon the finding of a board of their senior officers that they have been guilty of neglect or misconduct, or avoidable habits.[31]

§ 676. Injunctions to Prevent Removals.

In White v. Berry[32] it was held that the jurisdiction to determine the title to a public office belongs exclusively to courts of law, to be exercised by them by mandamus, certiorari, quo warranto or information in the nature of a writ of quo warranto, according to the circumstances of the case, and according to modes of procedure established by common law or by statute, and not by courts of equity by injunctive relief.

§ 677. Mandamus to Reinstate in Office.

In Keim v. United States[33] it was held that the action of the Secretary of the Interior in discharging a clerk in his department for incompetency was not subject to review in the courts either by mandamus to reinstate him or by compelling the payment to him of his salary. The court said:

"The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power."

§ 678. Power to Suspend from Office.

The power to suspend public officials from office has received almost no specific consideration in the Federal courts. In general, the power, in the absence of constitutional or statutory authorization, has been deemed to be implied in the power to remove.[34]

In 1886, when called upon by the Senate to send to it papers relating to a suspension of office made by him, President Cleveland, in a communication to the Senate, denied that there was any constitutional obligation upon his part to do what had been asked of him. He said: "I am . . . led unequivocally to dispute the right of the Senate by the aid of any documents whatever, or in any way save through the judicial process of trial on impeachment, to review or reverse the acts of the Executive in the suspension, during the recess of the Senate, of Federal officials."

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[31] 41 Stat. at L. 759, Sec. 24b.

[32] 171 U. S. 366.

[33] 177 U. S. 290, 293.

[34] This statement is made in Burnap v. United States (252 U. S. 512).

In the dissenting opinion of Justice Brandeis in the Myers case we find the statement: "It is not questioned here that the President, acting alone, has the constitutional power to suspend an officer in the executive branch of the Government."[35] In certain cases, acts of Congress have expressly authorized the President to suspend from office, but, so far as the author is aware, there have been no cases in which a direct examination has been made and adjudication had with reference to the power of the President to suspend from office in default of express statutory authorization.[36]

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[35] 272 U. S. 52, 242.

[36] *Cf. Cyc. sub. nom.* "Officers."

CHAPTER LXXII

MILITARY LAW

§ 679. Military Powers of the General Government.

Under the Articles of Confederation the General Government had not been granted adequate military authority. To it had been conceded by the States the power to "build and equip a navy." But for its land forces it was obliged to rely wholly upon requisitions made upon the States, each State being pledged to supply a quota in proportion to the number of its white inhabitants. The regimental officers of these forces were appointed by the States, only the general officers being appointees of the General Government. From these quotas the national forces were supplied. Over the militia bodies of the several States, the General Government was given no control whatever.

Under the present Constitution the Federal Government is given full power for the organization and maintenance of both the naval and land forces of its own, and a considerable authority over the State militia forces. The constitutional clauses in which these powers are granted are as follows:

"The Congress shall have power . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." The second article of amendment provides that "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

Other clauses of the Constitution give to the United States the power to exercise exclusive authority "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;"

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" and "To define and punish piracies and felonies committed on tne high seas, and offenses against the law of nations."

There is thus apparent the purpose to equip the National Government with adequate military authority to maintain itself against enemies both domestic and foreign. Upon the other hand, while the States are not deprived of military authority necessary to maintain domestic order or to protect themselves against invasion, the maintaining of armed forces for any other purpose, or the engaging in foreign war, or entering into alliances that may lead to war, is forbidden. By Clause 3 of Section 10 of Article I is declared: "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships-of-war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Section 4 of Article IV declares that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or the executive (when the legislature cannot be convened) against domestic violence."

§ 680. Military Law: Reference to Members of the Army and Navy.

The Constitution provides, as has been seen, that Congress shall have the power to provide and to make rules for the government and regulation of the land and naval forces. It has also provided that the President "shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

Under these grants of power Congress has established an Army and Navy, and by laws, passed from time to time, has provided the rules by which the respective powers and duties of the officers and men constituting this military establishment are to be determined and exercised. Collectively these rules are known as the Military Laws of the United States.

§ 681. Articles of War.

The chief of these military laws, so far as they relate directly to the duties and obligations of the individual soldier, are embodied in the so-called Articles of War, which constitute Sections 1342 and 1343, as amended, of the Revised Statutes.

With the details of this considerable body of statutory law we are not here concerned. With its general character, and especially with its relations to the civil portions of the law of the land, we are, however, interested.

§ 682. Obligations Assumed by Enlistment.

By enrollment in the military forces of the United States, the individual assumes new obligations, and is subjected to certain forms of control to which he was not before subject. But he does not lose his right to the protection of the civil and criminal law, nor is he released from any of his obligations thereunder. Thus the enlisted soldier comes under an obligation to obey all the provisions of the military code, and for the violation of any one of them is subject to trial before a military court, a court-martial, and, upon conviction, to punishment ranging in severity from a small fine or short imprisonment to loss of life. In cases of urgency, which do not admit of delay, he may be summarily punished by order of his superiors, without even a court-martial being convened. Furthermore, if the act for which he is tried, convicted and punished by the military authorities, is also an offence against the general law of the State in which he is, he may be tried, convicted and punished by the civil authorities of that State, Still further, as we shall see, if, in the justification of his act, he sets up the command of his military superior, it must appear that that order was one which that officer had authority to give. Thus the soldier may at times find himself in the dilemma that, if he refuse to obey the order of his military superior, he will receive immediate military punishment; whereas, if he obey it, he will later be held civilly and criminally liable in the ordinary courts. This dilemma, though easily conceivable, is not, in fact, often a serious one, for the soldier will not be held civilly and criminally responsible except in cases where he has grounds for knowing that the act ordered to be committed was not a proper one and not within the official power of his superior to command.

But, just as the individual soldier is still answerable in all respects to the non-military law of the State, so are his superiors when giving commands, as are also the members of courts-martial and of other military tribunals, when trying him, and the persons by whom the orders of such tribunals are carried into effect; and if any act is by them ordered or committed which is not warranted by the law of the land, they may be held civilly and criminally responsible by the ordinary courts. Not even the order of the President himself, the constitutional Commander-in-Chief of the Army and Navy, if that order be without authority of law, is sufficient to justify the performance of the act commanded.[1]

In time of war, as we shall see, the powers of the military commander, in the control of his own men, and of the citizens of the State to which he belongs, are much broader than they are in time of peace, but it is still true that they are subject to the limitations which the civil law imposes. With respect to the persons and property of the enemy, however, he is subject only to the limitations which the laws of war, as determined by international usage, supply, and for violation of these he is responsible only to the military tribunals.

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[1] Little v. Barreme (2 Cr. 170). *Cf.* Daw v. Johnson (100 U. S. 158).

§ 683. State Jurisdiction over Federal Military Officials and Privates.

As has been earlier stated, a member of the United States Army or Navy, or of any other military service of the United States, is, in time of peace, subject to the civil and criminal law of the States of the Union in which they may happen to be, whether in pursuance of the duties imposed on them by Federal law, or of private and personal interests; and, as thus obligated to the local law, may be subjected to civil and criminal processes of the State's courts, provided that it is deemed by the Federal authorities that the Federal Government is not, by the execution of such processes, unduly or unreasonably deprived of the services of its military officers or subordinates. It would appear, then, that it is always within the right of the Federal courts to determine, by habeas corpus proceedings, in each individual case, whether or not this is a fact, as well also to determine whether the act, charged against the defendant as a violation of the criminal law of the State, was authorized and therefore justified by Federal law.[2] It would appear, however, that this right of the Federal courts is one that should be used with great discretion.[3]

§ 684. Courts-martial.

The tribunals in which those who violate the military laws are tried (except where urgency demands a more summary method) are termed courts-martial.

These tribunals are presided over by military officers detailed for the purpose. No provision is made either for presentment or indictment by jury. The constitutionality of this is expressly provided for by the Fifth Amendment to the Constitution which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." There is no constitutional necessity for a trial jury in courts-martial. These tribunals are not parts of the judicial organization of the United States. According to English practice juries were never required in them, and it has never been questioned that they are not required by the Sixth Amendment.

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[2] United States v. Lipsett (156 Fed. Rep. 65). *Cf. In re* Turner (119 Fed. Rep. 231).

[3] Baker v. Grice (169 U. S. 284).

The decisions of courts-martial acting within their jurisdiction both as to the parties and the subject-matter are not subject to review by the civil courts. In assuming jurisdiction, however, they, in a sense, act at their peril, for their authority may be examined into by the civil courts, and if no jurisdiction is found, all acts committed by them are trespasses, punishment and damages for which the civil courts will award and the executive officers enforce.[4]

In Tarble's case, decided in 1872, was examined the right of a State court to inquire by writ of habeas corpus whether an individual is a member of the United States Army or Navy, and, therefore, subject, as such, to Federal military law. The court denied this right, and asserted that this was a question exclusively for the Federal civil courts to determine.[5]

§ 685. Jurisdiction of Courts-Martial over Offences Which Are Also Violations of the Local Civil Law.

In Coleman v. Tennessee [6] the court said: "We do not call in question the correctness of the general doctrine . . . that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee."

It is clear that there is here opportunity for conflict between the military and civil powers. Congress, however, has provided against these contingencies by giving the precedence in such cases to the civil courts.

§ 686. The Power of Congress to Vest in Military Tribunals Exclusive Jurisdiction over All Offences Committed by Military Persons Including Offences Which Are Also Crimes against the Civil Law.

There is an *obiter dictum* upon this point in Coleman v. Tennessee.[7] The point directly decided in that case was that a certain section (30) of the Enrollment Act had not, as a matter of fact, made the jurisdiction of the military tribunals over certain offences committed by soldiers in the Army exclusive of the State courts. But after deciding this in the negative the court added: "We do not mean to intimate that it was not within the competence of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States."

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[4] Dynes v. Hoover (20 How. 65).

[5] 13 Wall 397.

[6] 97 U. S. 509.

[7] 97 U. S. 509. *Cf. Ex parte* Mason (105 U. S. 696).

Whether or not, however, Congress has the constitutional power, except in time of war, to render the jurisdiction of military tribunals exclusive, as was suggested in Coleman v. Tennessee, would seem to be more doubtful; and when, if ever, that question is squarely presented to the Supreme Court, that tribunal may consider more carefully the possibility of the exaltation of the military over the civil authorities implicit in its *dictum* in the Coleman case.

In time of war, and especially upon the actual theatre of war, military courts have, without express legislative authorization, exclusive jurisdiction over the members of the military forces.

In Grafton v. United States,[8] it was held, not only that an acquittal in a civil court could be pleaded in bar of a subsequent proceeding before a court-martial, but that an acquittal by a court-martial could be pleaded in bar to a subsequent criminal trial in a civil court of the same government for the same act viewed as an offence against the civil criminal law. It is to be noted that the qualification "of the same government" is here made, and that, therefore, the doctrine would not apply as between trials in courts of States of the Union and courts-martial of the United States.[9]

§ 687. Military Tribunals and Civilians.

A reading of the relevant constitutional provisions shows that, while the powers of military tribunals are limited to cases arising out of operations of the land or naval forces, or of the militia when in actual service in times of war or public danger, the jurisdiction of these tribunals is not wholly restricted to persons in the military or naval forces of the United States, or to members of the militia when called into actual service. Thus, we find that Congress in its Articles of War has declared subject to military law and trial by military tribunals various classes of civilians. For example, one Article of War declares that "Whoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other things, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct."

The jurisdiction thus conferred would seem to be broader than that constitutionally justified by the doctrine declared in *Ex parte* Milligan[10] unless it be interpreted to apply only in time of war and within the actual theatre of military operations. In fact, it would appear to be so limited in the eyes of the military authorities, for, in the *Manual of Courts-Martial* of the United States Army, we find it so declared.[11]

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[8] 206 U. S. 333. *Cf.* Caldwell v. Parker (252 U. S. 376).

[9] In the Grafton case the plaintiff in error had been acquitted by a court-martial of the crime of homicide as defined by the Penal Code of the Philippines, and the attempt made thereafter to try him for the same offence in a civil court of the Philippines.

It has been held that a member of the militia who neglects, when ordered to do so by Federal law, to present himself for mustering into the United States Army, is triable by a court-martial, although, of course, he has not, technically, become a member of the Army.[12]

With regard to the jurisdiction of courts-martial of the National Guard, when not in the service of the United States, the National Defence Act of June 3, 1916,[13] provides that they shall have "cognizance of the same subjects and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the army of the United States." It would seem that the constitutionality of this provision is dependent upon a very broad construction of the term "disciplining" as used in the constitutional grant to Congress of the power to provide for "disciplining the militia, and for governing such part of them as may be employed in the service of the United States"; or upon a holding that the National Guard even when not in the active service of the United States is, under the National Defence Act, an integral part of the Army of the United States.[14]

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[10] 4 Wall. 2.

[11] p. 388.

[12] Martin v. Mott (12 Wh. 19), upon authority of Houston v. Moore (5 Wh. 1). It may be observed that, under the National Defence Act of June 3, 1916 (39 Stat. at L. 208), as amended by act of June 4, 1920 (41 Stat. at L. 759) a National Guardsman is required to take a Federal oath at the time of his enlistment and that he then becomes a member of the Federal military forces, and subject as such to military law from the time that he is drafted or ordered into active service.

[13] 37 Stat. at L. 161. Amended, April 17, 1918, 40 Stat. at L. 531.

[14] As to this, see the excellent article by Major L. K. Underhill entitled "Jurisdiction of Military Tribunals in the United States over Civilians," in the *California Law Review*, January, 1924 (Vol. XII, pp. 75–98). Major Hill says: "But 'disciplining' here means system of drill (27 Cyc. 496), and except when the militia are in Federal service the whole government of the militia is in the province of the State (People v. Hill, 13 N. Y. Supp. 637; 126 N. Y. 497). The National Guard is part of the militia except when drafted into Federal service under authority of Congress and discharged from the militia (Act of June 3, 1916, as amended by Act of June 4, 1920). It is not in Federal service unless so drafted, or unless called into Federal service by the President to repel invasion, suppress insurrection, or enforce the laws of the Union. Even at a manœuver camp for peace time training under Federal law the militia is not in Federal service (Digest Opinions Judge Advocate General, 1912, p. 704)."

See also this article for a discussion of the constitutional power of the States to provide for courts-martial in the militia.

The plenary power of Congress to subject enemy aliens to trial by military tribunals has not been doubted since Marshall, in the early case of Brown v. United States [15] declared as conceded that "war gives to the sovereign full right to take the person and confiscate the property of the enemy wherever found."

In time of war, and especially upon the actual theatre of war, military courts have, without express legislative authorization, exclusive jurisdiction over the members of the military forces.[16]

§ 688. The Organization and Disciplining of the Militia.

The "organizing, arming and disciplining of the militia," and the prescribing of the discipline for training them is expressly placed within the control of Congress. The actual training, however, of the militia, according to the discipline thus to be supplied by Congress, is kept within the hands of the State authorities. And, furthermore, to them is given in general the appointment of militia officers, and the entire government of the militia forces except when they have been called into the service of the General Government.

The present Federal laws passed under the constitutional authority for "organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States," provide: "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided,[17] not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia and the Unorganized Militia." [18]

§ 689. The National Guard.

The National Guard is declared to consist of regularly enlisted men. The organization of the Guard is the same as that of the Regular Army, subject to such exceptions as the Secretary of War may authorize. The President may prescribe the particular unit or units, as to branches or arms of service, to be maintained in each State, Territory, or District of Columbia, "in order to secure a force which, when combined, shall form complete higher tactical units."

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[15] 8 Cr. 110.

[16] Coleman v. Tennessee (97 U. S. 509).

[17] The exceptions relate to judicial and executive officers of the Government of the United States and of the several States and Territories, to persons in the military and naval services of the United States, to persons employed in the customs and postal services of the United States, to persons employed in armories, arsenals, and navy yards of the United States, to mariners, etc. Also exempted from combatant militia service, without regard to age, are "all persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief by such persons shall be established under such regulations as the President shall prescribe . . . but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant."

[18] Act of June 3, 1916 (39 Stat. at L. 197). Amended by act of February 28, 1925 (43 Stat. at L. 1075).

It is provided that the Guard shall "so far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipment as are or shall be provided for the Regular Army." Also, that the discipline and training of the Guard shall be the same.[19]

Provision is made by congressional statute for systems of courts-martial—general, special and summary—for the National Guard. These courts are constituted in a manner similar to that of the courts-martial of the Regular Army, and possess similar powers.

The enlisted strength of the National Guard is provided for by statute.

§ 690. Call or Draft of the National Guard into Federal Service.

It is provided by the act of June 4, 1920,[20] that: "When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examinations as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war or emergency, unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve.[21] All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army, whose permanent retention in the military service is not contemplated by law, and shall be organized into units corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct."

§ 691. The Militia as an Arm of the Federal Government.

The Constitution enumerates three purposes for aid in the effectuation of which the United States militia forces may be mandatorily called upon by the General Government. These are (1) to execute the laws of the Union, (2) to suppress insurrections, (3) to repel invasions.

The suppression of insurrections has been held to include the waging of civil war for the putting down of rebellion,[22] and the repelling of invasions to include the providing against an attempted or threatened invasion.[23] The President may, when calling upon the militia, apply to the governors of the States to give the necessary orders, or may issue his orders directly to the commanding officers of the militia.[24] When called into the Federal service, the militia comes under the same complete Federal control as the regular national forces, and is subject to the Rules and Articles of War.[25]

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[19] Statutory provision has also been made by Congress for a "National Guard Reserve," for a "Naval Militia," and for "Reserve Naval Forces."

[20] 41 Stat. at L. 784.

[21] As to the National Guard Reserve, see § 693.

[22] Texas v. White (7 Wall. 700); Tyler v. Defrees (11 Wall. 331).

In Martin v. Mott [26] the doctrine was declared, which has not since been questioned, that the President is given by the Constitution the sole and exclusive power to judge as to whether an exigency has arisen calling for a use of the militia by the Federal authorities.

When called into Federal service, the statutes provide that the National Guard shall be subject to the laws and regulations governing the Regular Army so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active or retired list, is contemplated by existing law.[27]

The purposes for which the State militia forces may be used by the Federal Government are enumerated by the Constitution. There is ground, therefore, for saying that the militia may not be sent outside of the United States except in so far as this may be necessary to accomplish the purposes thus specified. It is clear, however, that this limitation does not apply when the militia is drafted into and made a part of the Regular Army of the United States.

§ 692. The Use of the Militia and Federal Troops to Suppress Domestic Disorder.

From the foregoing it is seen that in all cases in which the integrity or existence of the National Government is attacked or threatened, or a resistance is offered to the execution of its laws too great to be overcome by the ordinary agencies of government, the aid of the Federal troops or of the organized militia of the States may be at once called upon. In cases, however, of domestic violence within a State, directed against its laws and government, the Federal arm may extend help only when called upon by the State authorities.[28]

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[23] Martin v. Mott (12 Wh. 19).

[24] Houston v. Moore (5 Wh. 1).

[25] Houston v. Moore (5 Wh. 1).

[26] 12 Wh. 19.

[27] Act of June 3, 1916 (39 Stat. at L. 208).

[28] See *In re* Debs (158 U. S. 564), in which was upheld the right of the President to send troops into Illinois at the time of the great railroad strike of 1894, although not requested so to do by the governor of the State. The court held that

§ 693. Conscription.

It will have appeared from the accounts which have been given of the militia law that Congress has declared the obligation of every able-bodied male citizen, and of aliens who have declared their intention to become citizens, of the ages designated, to serve in the militia of the United States, and that the "organized" portions thereof, termed the National Guard, may be drafted and incorporated in the Regular Army of the United States. The National Guard, however, consists of only those members of the militia who have voluntarily enlisted therein, and thus received the benefit of the training and appropriations for equipment provided by the Federal Government.

However, it is not open to doubt that the United States has the constitutional power to compel military service, that is, by drafting into its military services (army, navy, aviation, etc.), all or any selected part of its citizens.[29] This proposition, if it could be said to have been in doubt as late as 1917, was conclusively settled by the Supreme Court in Arver v. United States [30] in which was upheld the constitutionality of the act of Congress of May 18, 1917,[31] commonly known as the "Selective Draft Law." In its opinion in this case the court went on to develop at some length the rational foundation upon which this right of a State to command the military services of its citizens is based and to point to the fact that this right is recognized in practically all, and perhaps all, sovereign states. This argument, because of its length, it is not practical to reproduce, but the following sentence may be quoted: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."[31a] The court also went on to emphasize that the constitutional provisions regarding the militia are to be sharply distinguished from those which confer upon Congress the power to raise armies, and, therefore, the fact that certain limitations are imposed by the Constitution upon the use of the militia for Federal purposes does not operate, argumentatively, to limit the power of the United States to raise and employ armies.[32]

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the protection of Federal rights was needed, and, therefore, that Federal action was justified.

[29] As to resident aliens, see *post.*

[30] 245 U. S. 366. See also O'Connell v. United States (253 U. S. 142).

[31] 40 Stat. at L. 76. See also the act of February 28, 1919 (40 Stat. at L. 1211).

[31a] 245 U. S. 366, 378.

[32] The course of earlier legislation, and especially the draft laws during the Civil War, is also traced; and attention is directed to the fact that the draft law of March 3, 1863 (12 Stat. at L. 731), was upheld in a case which was identical in character with the instant case. Kneedler v. Lane (45 Pa. 238).

§ 694. Declarant Aliens under the Selective Draft Act.

The inclusion, by the act of May 18, 1917, of declarant aliens among persons subject to the draft gives rise to no constitutional question. Its propriety can be questioned by other States in behalf of their own citizens thus included only as being in violation of treaties which such nations may have with the United States or as being in violation of accepted doctrines of international law and practice. Such protests on the part of other States cannot be made to the courts, but will have to be addressed to the Department of State, and, through it, to the President. As a matter of practice, it has been usual for the United States to exempt aliens, whether they have previously declared an intention to seek citizenship or not, upon request of the aliens' home countries. But whether there exists, under international law, an obligation so to do, is by no means clear.[33] It is certain, however, that international law would not sanction the compelling of an alien to fight against his own country.

§ 695. Drafting of Non-Combatants and of Property.

There has been some discussion as to the desirability in a future war, should one come, of drafting into the National service not only persons for direct military service, but also persons for carrying on those industries of the country whose products, whether of food, clothing, or other material, are needed either for the maintenance of the military and civil branches of the government, and also the whole body of citizens upon whom, in the last resort, the Government must depend for the successful prosecution of the war. It would seem, from the doctrines which have been already established, and which have been discussed in the preceding sections, that Congress may constitutionally do this. It is true, that in the past, States have seldom drafted persons except for military duty, but, looking at the matter in a reasonable way, it would seem less drastic for a State to require of its citizens their labor or their properties in its fields of production or of non-military personal services than to require them to render military service with its accompanying risks to life and limb. There is this difference that the rendition of military service is clearly a means of carrying on the war, whereas, this is not obvious in the case of non-military services. However, where it is shown, as a matter of fact, that there is a reasonable relation between such compulsory non-military service and the successful prosecution of the war, a constitutional justification for it could be found in the war powers of Congress.[34]

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[33] For a collection of authorities see H. R. Rpt. 115, 65th Cong., 1st Sess.

[34] As to whether property thus taken would have to be paid for and other constitutional questions see the able article "The Universal Draft and Constitutional Limitations" by Joseph M. Cormack, in 3 *S. Calif. Law Review*, 361.

§ 696. Declaration of War.

To Congress is expressly granted by the Constitution the power to declare war. This has been construed to include the right to declare that a state of war has been created by the act or acts of foreign powers hostile to the United States, and, in fact, in the foreign wars in which the United States has been involved, the declaration of Congress has taken this form. Furthermore, these declarations have been made upon the recommendation of the President, though there is no question but that Congress may take the initiative in recognizing a state of war as existing.

It is also to be noted that the power constitutionally vested in the President with regard to the control of the foreign relations of the United States makes it possible for him to bring about a situation in which, as a practical proposition, there is little option left to Congress as to whether it will or will not declare war or recognize a state of war as existing.

§ 697. War May Exist without Congressional Declaration or Recognition.

War may come into existence as a fact without a formal declaration. In the Prize Cases [35] the Supreme Court has held that this existence of war as a fact may be recognized by the President, in advance of congressional declaration, and that he may thereupon take action, as, for example, the establishment of a blockade, which in time of peace he would not be constitutionally empowered to institute.

In the case of The Protector [36] the court held that the war had begun at the times of the President's two proclamations of blockade, April 19 and 27, 1861, but that it had closed at different dates in the different States.

To the writer it seems to have been a very questionable construction of the Constitution to hold that, in the case of a civil struggle, the President has the power, upon his own judgment, to affix to it the character of a public war, and thus to bring into existence all the many legal conditions which that status imports. That he should have full power to use all the forces of the nation to put down resistance to the execution of the Federal laws there can be no question, but it would seem that the explicit declaration of the Constitution that to Congress belongs the power to declare war necessarily excludes from the executive sphere of authority the power to pronounce that public war exists.[37]

That no war can exist between the United States and a foreign State, except by the declaration of Congress, there has never been any doubt.

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[35] 2 Black, 635.

[36] 12 Wall. 700.

[37] See the dissenting opinion of Justice Nelson in the Prize Cases.

This declaration may, however, be that a state of war exists, or one declaring that war shall be begun. The terms of such a declaration fix the exact date of the beginning of the war so far as concerns matters of municipal law, and are binding on the courts of the State issuing it. From the viewpoint, however, of other nations, such a declaration is not conclusive, the beginning of the war being a question of fact to be interpreted in the light of the general principles of international law.[38]

§ 698. The Termination of War.

The termination of the legal status of war is to be distinguished from the cessation of hostilities in the field. There is no question that the President, as Commander-in-Chief of the armed forces of the Nation, may direct a discontinuance of active hostilities, that is, of military operations, but, when he does so, this does not bring the war to an end as a legal situation. In Hijo v. United States [39] the court, with reference to the Spanish-American War, pointed out that the war could not be said to have terminated by reason of the protocol of August 12, 1898, issued by the President, and by his proclamation of the same date, and that such termination did not occur until the ratification of the treaty of peace in April of the next year.

As is well known, in the case of the World War armistices were signed on November 11, 1918, but treaties of peace were not ratified until August 1, 1921, with Germany, and August 24, 1921, with Austria. Nevertheless, prior to these latter dates, commercial relations with Germany had, to a certain extent, been resumed, and, on November 11, 1918, when President Wilson transmitted to Congress the terms of the armistices which had been entered into, he had declared that "the war thus comes to an end, for, having accepted these terms of the armistice, it will be impossible for the German command to renew it."

It is clear, however, that neither the President nor Congress regarded the war as legally terminated by the armistice, for, subsequent to its date, Congress passed and the President approved, acts based upon the assumption that a state of war still continued. Such was the War Time Prohibition Act of November 21, 1918 [40] which in its text referred to the war as still continuing.[41]

While it clearly appears that a war to which the United States is a party is not brought to a legal end by a mere cessation of hostilities, whether marked by a formal armistice or otherwise, it does not clearly appear whether the formal act which does bring the status of war to an end, so far as the United States is concerned, may not be by congressional or presidential action as well as by the ratification of a treaty of peace. Indeed, in the case of the Civil War of 1861–1865, it was not possible to terminate it by a treaty of peace, since there was no recognized government or State with which a treaty could be entered into; and the same might be true in the case of a war with a foreign power in which that power might be so entirely destroyed, and its people and territory so drawn under the United States sovereignty as to leave existing no political entity or person with which, or with whom, a treaty of peace could be negotiated. In such cases it does not appear to have been clearly determined whether the termination of the status of war should be by presidential proclamation or by congressional resolution or declaration.[42]

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[38] Upon this point see the very thoughtful paper of T. S. Woolsey entitled "The Beginnings of War," published in Vol. I, p. 54, of the *Proceedings of the American Political Science Association.*

[39] 194 U. S. 315.

[40] 40 Stat. at L. 1045.

[41] Hamilton v. Kentucky Distilleries & Warehouse Co. (251 U. S. 146).

It would seem to the author that, should it become necessary at some later time to decide specifically whether the constitutional power to terminate a war, which is not terminated by a treaty of peace, is vested in Congress or in the President, or in both, that it would be more reasonable to hold that the power is vested, and perhaps exclusively, in Congress, since, to that body being expressly given by the Constitution the power to declare war, it may be inferred that it was intended that it should have the right to annul the effect of the exercise of that power, that is, to bring to an end that condition or status which it has created.[43]

§ 699. War Powers of the President.

The Constitution makes no specific provision for the exercise by the President of exceptional powers in time of war, but the fact is none the less true that, in time of war, he is enabled to exercise his specifically given powers more vigorously than in time of peace, and Congress is, as a matter of expediency, compelled to grant to him wide discretionary statutory powers.

The power of the President so to influence events as to make war practically inevitable is involved in the degree of constitutional power which he possesses to control the foreign relations of the United States. The power of the President to recognize a state of public war as existing, and to bring to an end such a status has already been discussed. Elsewhere, also, is discussed his power, in time of war, to suspend the writ of habeas corpus. The special and extraordinary powers which the President has exercised in times of war have been those given to him by statute, and thus raise questions as to the war powers of Congress rather than of the war powers of the President.[44]

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[42] As regards the termination of the Civil War of 1861–1865, see United States v. Anderson (9 Wall. 56); Freeborn v. The Protector (12 Wall. 700).

[43] For an argument that Congress should be held to have this implied power even with respect to foreign war which might be terminated by treaties of peace, see the article of Professor E. S. Corwin, "The Power of Congress to Declare Peace," in 18 *Michigan Law Review*, 669.

See also, generally, with regard to the subject, the article by Professor J. M. Mathews, "The Termination of War" in 19 *Michigan Law Review*, 819, and that by F. R. Black, "The Termination of Hostilities" in 62 *American Law Review*, 248.

§ 700. Powers of the President as Commander-in-Chief of the Army and Navy.

The constitutional Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the service of the United States, is the President.[45] Through, or under, his orders, therefore, all military operations in times of peace, as well as of war, are conducted. He has within his control the disposition of troops, the direction of vessels of war and the planning and execution of campaigns. With Congress, however, lies the authority to lay down the rules governing the organization and maintenance of the military forces, the determination of their number, the fixing of the manner in which they shall be armed and equipped, the establishment of forts, hospitals, arsenals, etc., and, of course, the voting of appropriations for all military purposes.[46]

With respect to many matters of detail Congress has delegated to the President and to his executive subordinates the promulgation of administrative orders for the government of the land and naval forces which it might constitutionally itself provide, but which in fact it is either impossible or unwise for it to attempt to do. All orders of the President, or of the Secretary of War issued under his authority, whether given by virtue of his constitutional office as Commander-in-Chief or of his statutory powers, have the full force of law.[47] But in all cases these orders must, if issued by virtue of authority congressionally given, pursue the terms of the granting statute; and, if issued by virtue of his constitutional authority, be in accordance with the generally accepted principles of international law and custom. Where this is not done, they will not justify the acts of subordinates acting under them.[48]

United States troops, especially the Marine Corps, have frequently been sent to foreign countries in time of peace and have engaged there in active fighting for the attainment of specific and limited purposes, sometimes in pursuance of existing treaties and sometimes not.

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[44] For an elaborate and able statement of the so-called war powers of the President see C. A. Berdhal's "War Powers of the Executive in the United States," *Univ. of Illinois Studies in the Social Sciences*, Vol. IX, 1920.

[45] Art. II, Sec. 2, Cl. 1.

[46] The distinction between congressional and presidential powers in military matters is drawn by the Supreme Court in *Ex parte* Milligan (4 Wall. 2).

[47] United States v. Freeman (3 How. 556); Smith v. Whitney (116 U. S. 167).

[48] Little v. Barreme (2 Cr. 170).

At the outbreak of the Civil War, President Lincoln, without waiting for any authorization from Congress, and under his avowed right as Commander-in-Chief of the Army and Navy, by proclamation provided for greatly increasing the size of the Regular Army and Navy. There can be but little doubt that this was in excess of his constitutional powers. Indeed, President Lincoln hardly attempted to defend his acts upon legal grounds. In his message to Congress of July 4, 1861, he said of them: "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.[49]

President Wilson asserted that, although the United States was not at war, he had the constitutional right, without express constitutional authorization, to arm merchant vessels with defensive guns, but that he preferred to obtain that authorization.[50] The Congress refused to give this authorization, whereupon President Wilson proceeded, on the basis of his own authority, to equip merchant vessels with guns and gunners assigned to them from the Navy.

§ 701. War Powers of Congress.

The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal. Indeed, the President, in the exercise simply of his authority as Commander-in-Chief of the Army and Navy, may, unless prohibited by congressional statute, commit or authorize acts not warranted by commonly received principles of international law; and Congress may by law authorize measures which the courts must recognize as valid even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus during the Civil War in certain cases the provision by congressional statute for the confiscation of certain enemy property or land was enforced, though such confiscation was not in accordance with the general usage of foreign States.

Even in dealing with its own loyal subjects, the power to wage war enables the government to override in many particulars private rights which in time of peace are inviolable.

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[49] Congress promptly gave this ratification. 12 Stat. at L. 326.

[50] See his message to Congress of February 26, 1917.

In Miller v. United States[51] the court had before it certain confiscation acts, enacted by Congress during the Civil War and with reference to the prosecution of that war. These acts, the majority of the court held valid as prescribing legitimate modes or means of carrying on the war. In the course of its opinion the court said: "Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." This language the court has repeated, in substance, in later cases.[52]

In Littlejohn & Co. v. United States,[53] to the contention that it was unconstitutional for Congress to provide, as it had provided by Joint Resolution of May 12, 1917,[54] for the seizure and confiscation of enemy ships in its harbors in time of war, because such seizure and confiscation was not warranted by generally recognized international law and practice, the court said: "It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs."[55]

In Central Union Trust Co. v. Garvan[56] the court assumed without argument the validity of the Trading with the Enemy Act of October 6, 1917,[57] providing for the seizure in war time of property supposed to belong to the enemy.

Other illustrations of war legislation by Congress during the World War were the regulation of the price of fuel, the enforcement of nationwide prohibition, the commandeering of ships, the commandeering of various factory products, and the taking over for operation by the government of the telegraph and railway lines of the country.[58]

The power to wage war carries with it the authority not only to bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal.[59]

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[51] 11 Wall. 268.

[52] Stewart v. Kahn (11 Wall. 493); Mechanics and Traders Bank v. Union Bank (22 Wall. 276).

[53] 270 U. S. 215, 226.

[54] 40 Stat. at L. 75.

[55] Citing Brown v. United States (8 Cr. 110). It may be said that, even had there been treaties *contra*, a later act or joint resolution of Congress would control the courts.

[56] 254 U. S. 554.

[57] 40 Stat. at L. 411.

[58] For cases sustaining this legislation, see Northern Pacific R. Co. v. North Dakota (250 U. S. 135); Dakota Central Tel. Co. v. South Dakota (250 U. S. 163); The Lake Monroe (250 U. S. 246); Hamilton v. Kentucky Distilleries Co. (251 U. S. 146), and Highland v. Russell Car and Snow Plow Co. (279 U. S. 253). In general, in these cases, the constitutionality of the acts of Congress as war measures was taken for granted without argument.

§ 702. Letters of Marque and Reprisal and Captures on Land and Water.

Congress is expressly authorized by the Constitution to grant letters of marque and reprisal and to make rules concerning captures on land and water.

It has been held that letters of marque may be granted to privateers to make captures within the territorial waters of the United States as well as upon the high seas.[60]

Similarly Congress may make rules concerning captures within the United States as well as upon the high seas or upon foreign soil.[61]

§ 703. War Powers Subject to Constitutional Limitations.

Comprehensive though the powers of Congress are to authorize measures for the prosecution of a war, they are by no means constitutionally unlimited, for there still remain in force, in war as well as in peace, the general constitutional limitations upon the exercise of Federal powers. This was not disputed by either the minority or majority justices in the Milligan case,[62] and the doctrine has been repeated in the cases which have arisen since the World War. In United States v. L. Cohen Grocery Co.[63] in which the court had under consideration the Food Control Act (Lever Act)[64] of 1919, it was declared: "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

In Hamilton v. Kentucky Distilleries Co.[65] the court said: "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

The character of these constitutional limitations upon the powers of Congress in time of war will appear more fully in the discussion which is to come regarding Martial Law in the United States.[66]

With regard generally to the power of Congress to authorize operations for the carrying on of war, which operations would not be constitutional as peace measures, it is to be said that the measures thus justified are not limited to those which relate directly to military operations, nor is their constitutional basis destroyed by the cessation of active hostilities. These doctrines were illustrated and declared in Hamilton v. Kentucky Distilleries Co.[67] with reference to the Wartime Prohibition Act of November 21, 1918,[68] which, as is seen by its date, was passed after the armistice of November 11, 1918, which brought active military operations to an end.

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[59] Stewart v. Kahn (11 Wall. 493). See also, Northern Pacific R. Co. v. North Dakota (250 U. S. 135).

[60] The Experiment (8 Wh. 261).

[61] Brown v. United States (8 Cr. 110).

[62] *Ex parte* Milligan (4 Wall. 2).

[63] 255 U. S. 81, 88.

[64] 41 Stat. at L. 297.

[65] 251 U. S. 146.

[66] See Chapter LXXIV.

§ 704. Continuation of War Measures after the Termination of War.

Whether war measures, constitutionally justified only as such, may continue in force after the termination of war, and until the abnormal conditions created by the war have substantially disappeared, is a more difficult question to answer. There are cases which would seem to imply that the question may be answered in the affirmative, although, undoubtedly, the courts would refuse to recognize the validity of a flagrant abuse of this authority.[69]

The reasoning with reference to the continuance in force of war measures after the legal termination of a war would seem to be at least partially applicable to a time before war is actually declared or recognized as existing, but when it is seen to be so imminent and apparently inevitable as to require that emergency measures be adopted either to prevent it, if possible, or to prepare for it, if it be not prevented.

It is clear that no constitutional objections could reasonably be made to acts of Congress passed in time of peace which provide that they shall not be operative except in time of war.

§ 705. War Powers of the States.

It has appeared earlier in this treatise, in the chapter dealing with the conduct of the Foreign Relations of the United States, that the States of the Union may not, as such, engage in a foreign war. It has also appeared, however, that the States may, when the United States is at war, enact laws in aid of the United States which, in some cases at least, would not be valid except for the existence of the emergencies created by the war. During the World War there was a very considerable body of such legislation by the States.

A case which bears upon this point is that of Gilbert v. Minnesota[70] in which it was held that Federal power had not been usurped or encroached upon by a State which, by its statute, had made criminally punishable the advocating or teaching that men should not enlist in the military or naval forces of the United States. The court, in the course of its opinion, said: "This country is one composed of many, and must on occasions be animated as one, and . . . the . . . constituting sovereignties must have power of co-operation against the enemies of all. Of such instance, we think, is the statute of Minnesota."

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[67] 251 U. S. 146.

[68] 40 Stat. at L. 1045.

[69] Although not directly in point, see Commercial Trust Co. v. Miller (262 U. S. 51).

[70] 254 U. S. 325.

CHAPTER LXXIII

MILITARY GOVERNMENT

Government of specific areas by the military forces of the United States under the command of the President may constitutionally exist in time of peace as well as in time of war, and with reference to domestic as well as to foreign territories.

§ 706. Military Government of Foreign Territory.

Government of foreign territories by the armed forces of the United States may result from occupation in time of war or in execution of treaty provisions.

During the Spanish-American War, Cuba, then a colony of Spain, was seized and in part occupied by American troops and governed by them under the authority of the President in pursuance of his war powers. By the treaty of peace between Spain and the United States, which was signed at Paris on December 10, 1898, and ratifications exchanged and proclamation made on April 11, 1899, it was provided that Spain relinquished all sovereignty over and title to Cuba, and that "as the island is, upon its evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property." [1]

Under this treaty provision the United States remained in military occupation of the island until May 20, 1902, when the autonomous and sovereign Republic of Cuba was inaugurated. During this period, the United States exercised through its military forces full governing powers, including the dictation and control of the steps leading up to the ordaining and establishing of the Cuban Constitution.

In Neely v. Henkel,[2] it was held by the Supreme Court that, during this period, Cuba was territory foreign to the United States and that the American military occupation and control originally established as a military means of carrying on the war, and justified as such, had been continued as a means of carrying out a treaty obligation entered into by the United States, and constitutionally justified as such, and that the act of Congress, the validity of which was contested in the case, had been justified as in aid or execution of that treaty obligation.

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[1] Article I. Article XVI of this treaty also provided: "It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations."

[2] 180 U. S. 109.

The law of military occupation of foreign territory in time of war is that sanctioned by general international law. According to this, the power of the military commander is legally supreme. For no act that he or his subordinates may commit can he or they be held liable in the civil courts of the United States or of the State whose territory is occupied. The only limits to the military authority are those which international law and usage, upon the ground of humanity and justice, impose, and breaches of these are cognizable only in the military courts.[3]

When in military occupation of foreign territory in time of war the members of the United States forces, military and naval, are bound by such rules or regulations as have been provided by Congress or by the President as their constitutional Commander-in-Chief. For violations of these rules or regulations they may be punished by military processes.

During military occupation of foreign territory, though there is no obligation by either constitutional or international law to establish courts or to permit the continued operation of local courts for the trial of ordinary civil and criminal cases according to local law, there is nothing to prevent this being done, and, in fact, in modern times this is usually done. Indeed, the principle is now well established that, until expressly declared otherwise, local private law and the tribunals for its administration, continue in operation. But in all such cases the courts, whether established or allowed to continue, exist essentially as military courts, and the law which they enforce has validity only by military order and permission; for the first effect of military occupation is to sever, for the time being, all the former political relations of the inhabitants of the territory, and to destroy the *de jure* character of the former organs of government.[4]

§ 707. Military Government of Domestic Territory in Time of War.

In practically all respects the laws governing the military occupation of hostile foreign territory apply to the military occupation of hostile domestic territory in time of a civil war which has assumed a public character.[5]

The fact that the sovereign State continues to claim sovereignty and to exercise powers as such does not prevent it from exercising at the same time all the rights of a belligerent. This was conclusively determined in the Prize Cases.[6] In that case, as will be remembered, it was held that there lies within the discretion of the President as Commander-in-Chief of the Army, a discretion not reviewable by the courts, to determine when an insurrection or civil war has assumed such proportions as to warrant him in declaring that a state of public war exists.

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[3] New Orleans v. S. S. Co. (20 Wall. 387); Dooley v. United States (182 U. S. 222). *Cf.* Lieber's "Instructions for the Government of Armies of the United States in the Field."

[4] *Cf.* Coleman v. Tennessee (97 U. S. 509).

[5] New Orleans v. S. S. Co. (20 Wall. 387).

The right of confiscation and other belligerent rights thus exercisable by the military authorities within the United States during civil war must, in every case, be authorized by some competent officer or tribunal acting under the sanction of an act of Congress. That is to say, the individual soldier or officer is not allowed individually, and without obtaining the decree of a competent military or other tribunal, to seize private property as a prize of war.[7]

§ 708. Military Government of Domestic Territory in Times of Peace.

Military governments established on foreign territory in time of war do not necessarily come to an end with the declaration of peace and the annexation of the occupied territory to the United States; and the same is true, after the conclusion of peace, of military governments established in insurrectionary domestic territory. But these governments, though military in character, rest upon a different basis, and have somewhat different powers from those maintained during war.

Military governments in time of peace, whether in territories newly annexed to the United States, or in districts lately in rebellion, no longer derive their authority from the President as Commander-in-Chief of the Army and Navy, but exist by the tacit or express command of Congress. Until Congress acts, the President may maintain military governments by virtue of the fact that he is Commander-in-Chief of the Army and Navy and obligated to take care that the laws be faithfully executed wherever Federal sovereignty extends. Such governments as he may establish or continue in existence after the conclusion of war in annexed territory are, however, subject to the will of Congress either to change or abolish.

Illustrative of this principle were the military governments set up in the Southern States during and after the conclusion of the Civil War. While that war was in progress there was no question as to the power of the Executive to set up military governments in districts occupied by the Federal troops. With the conclusion of that war, however, Congress at once asserted its exclusive right to determine the manner in which the

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[6] 2 Black, 635. See also Mrs. Alexander's Cotton (2 Wall. 404); Miller v. United States (11 Wall. 268).

[7] Brown v. United States (8 Cr. 110).

States lately in secession should be ruled until their civil status should be fully restored.

The right of Congress to maintain military governments in States of the Union after the restoration of peace was based partly on the ground of military necessity—that, though war had ceased, the results for which it had been waged were not yet fully secured—and partly on the ground that it lay with Congress to guarantee to the States loyal governments republican in form, and that to obtain these it was necessary for a time to furnish protection to the loyal portions of their populations.

The status of these military and "reconstruction" governments was exhaustively considered in the great case of Texas v. White, decided in 1869.[8]

That, until Congress acts, the military governments established by the President under his war powers may continue in existence after the conclusion of peace in territories belonging to the United States, has been several times declared by the Supreme Court.[9]

The distinction between a government essentially military in character, and one administered through the agency of the Army or Navy in time of peace over domestic territory by the President explains the fact that, in the two cases the powers of the President are not the same.

Though military in form, the governments established or maintained by the President in time of peace in territories subject to the sovereignty of the United States may not be granted as complete a governing authority as that which they possess in time of war. The authority which may constitutionally be given to or exercised by them is determined by the purposes for which they exist. In time of war they have full power, legislative, executive and judicial, to do anything the laws of war, as determined by international usage, permit to be done, that will strengthen themselves or weaken the enemy. War having ended, however, and the territory become domestic, the powers of the military commander become simply administrative in character, and his acts, so far as the necessities of the case permit, are limited by the general and constitutional laws of the country under whose authority he acts. He, in fact, enjoys authority no longer by virtue of belligerent right, but as an agent of the sovereign of the country for the establishment and maintenance of civil rights therein. As Magoon expresses it, he ceases to occupy the place of the suspended or expelled sovereignty, and becomes an instrument of the new sovereignty. He becomes the representative of sovereignty, instead of a substitute.[10]

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[8] 7 Wall. 700.

[9] Cross v. Harrison (16 How. 164); Santiago v. Nogueras (214 U. S. 260).

[10] *Reports on the Law of Civil Government in Territory Subject to Military Occupation*, p. 20.

The powers of the military government in time of peace in domestic territory being those simply of a local administrative agent of the United States, they are subject to two general limitations. First, being of an administrative character, they do not include general legislative power, that is, the authority to establish laws with more than strictly local effects; and, second, such powers as are possessed, are subject to the privileges and immunities created and guaranteed by the Constitution. How far these constitutional privileges apply to governments, whether military or civil, established in territories belonging to, but not "incorporated" into the United States, has been considered in an earlier chapter. In all other domestic territory, whether in a Territory or in a State lately in rebellion, these constitutional limitations apply, and the agents have, therefore, and can be endowed by Congress and the executive with only such powers as may be exercised at any time and in any place under the doctrines of "martial" as distinguished from "military" law.[11] In short, their extent is measured by the necessity for their exercise.

Acting upon this principle, the Supreme Court in Raymond v. Thomas [12] held void an act of a reconstruction military commander in South Carolina, by which he attempted to annul the decree of a court of that State.

With reference to the absence of general legislative power, after war is terminated, the court in Dooley v. United States [13] held that though, prior to the treaty of peace, the military commander might, as a belligerent right, levy customs duties on goods coming into Porto Rico from the United States, after that date he no longer had the authority.

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[11] See the next chapter.

[12] 91 U. S. 712.

[13] 182 U. S. 222.

CHAPTER LXXIV

MARTIAL LAW

§ 709. Martial Law Defined.

In the most comprehensive sense of the term, Martial Law includes all law that has reference to, or is administered by, the military forces of the State. Thus it includes (1) Military Law Proper, that is, the body of administrative laws created by Congress for the government of the Army and Navy as an organized force; (2) the principles governing the conduct of military forces in time of war, and in the government of occupied territory; and (3) Martial Law *in sensu strictiore*, or that law which has application when the military arm does not supersede civil authority but is called upon to aid in the execution of its civil functions.[1] This last form of Martial Law, which is to be considered in this chapter, is to be sharply distinguished from those forms of Military Law which have been already considered.

§ 710. Martial Law a Form of the Police Power.

That which brings martial law closely into relation with military law is the fact that it is administered by the armed forces of the State, and that it partakes, in a measure at least, of its absolute character. That is to say, under its control, certain of the guarantees to the individual against personal injury on the part of those in authority furnished by the civil law, are in abeyance. But in all other respects, as we shall see, martial law belongs in the field of civil rather than that of the military law. Indeed, martial law is essentially a branch of the police laws of the State, and its exercise is governed by the same principles as those which control the exercise of the so-called police powers of the State.

§ 711. Martial Power Limited.

However, as we have earlier seen, though there are necessarily many circumstances under which the political power, in behalf of public interests, may interfere with the freedom of action of the individual and the use by him of his own property, in no one of these instances may this interference be an arbitrary one. That is to say, in each case the propriety of the interference may be questioned by the individual, and, when so questioned, the official whose act constitutes the interference must be able to justify his act by referring to a valid law and to some consideration of public necessity or convenience. If a person is drafted into military service, there must have been enacted a valid drafting law, including within its application the class of persons to which the individual drafted belongs. If a contract formally valid is refused enforcement, it must be shown to be opposed to public policy. If property is taken under eminent domain it must be for a public use, and compensation must be given. If the rates charged by public service corporations are regulated by law, the regulation must be a reasonable one and not one, in its effect, confiscatory of private property. Finally, to constitute a valid exercise of the so-called police power of the State, there must be shown some public advantage to be gained by thus interfering with the personal liberty and property rights of the individual.

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[1] *Ex parte* Milligan (4 Wall. 2).

Now, in exactly the same way in which the civil authorities may by law or through executive action control the activities of the individual and the use of his property in the interest of the public good, the military arm of a government may be employed to preserve the public peace and to secure the execution of the laws.

In European countries, living under written constitutions, provision is quite generally made for the declaration in times of danger of what is called a "state of siege," the effect of which is immediately to suspend the operation of all the ordinary constitutional limitations upon executive power. No similar status is known to American law. The use of the military arm of our States or of the Federal Government in time of peace and upon domestic soil to maintain order and secure the execution of law in no wise operates to suspend civil law or to negate the individual rights of liberty and property, any more than the ordinary exercise of the police powers of the State has this effect. The use of the military forces of a State for the maintenance of order and law is, indeed not dissimilar in purpose and character to the employment by a sheriff, of a *posse comitatus* to assist him in making an arrest, preventing an escape or serving a writ. In both cases those who exercise authority are obliged to justify whatever acts they may have committed by showing their necessity, or, at least, producing evidence to show that they had reasonable grounds for believing them to be necessary.

§ 712. Martial Law Does Not Abrogate Civil Law and Civil Guarantees.

There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military is substituted for civil law. So-called declarations of martial law are, indeed, often made, but the legal effect of these goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law.[2]

During the time that the military forces are employed for the enforcement of law, that is to say, when so-called martial law is in force, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the individual are suspended. The relations of the citizen to his State are unchanged. Whatever interference there may be with his personal freedom or property rights must be justified, as in the case of the police power, by necessity, actual or reasonably presumed. During times of disorder, such as lead to a call upon the military forces for assistance, necessity naturally demands the commission of acts which in more tranquil times are not demanded, and thus, in fact, those in authority may control the individual and his property in ways which they could not legally do at other times, but the principle still holds good that necessity, and necessity alone, will justify an infringement upon private rights of person and property.

§ 713. Martial Law and Military Government Distinguished.

It is thus seen that martial rule, that is, the use of the military arm for the enforcement of civil law, is something quite different from the establishment of military government over territory conquered in public war. Mr. Magoon draws this distinction admirably in the following words: "A military government," he says, "takes the place of a suspended or destroyed *sovereignty*, while martial law, or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty. The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion. The occasion of martial rule is simply public exigency which may arise in time of war or peace. A military government, since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions." [3]

It is to be observed before leaving this point that, so far as regards the acts that may be done by military and civil authorities in effectuating their purposes, the necessity for them being present, there is no difference between the commander's powers in a domestic insurrection and in a war. As the Supreme Court of Pennsylvania in a recent case has said: "In truth he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved." [4]

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[2] Ela v. Smith [5 Gray (Mass.), 121].

[3] *Reports on the Law of Civil Government in Territories Subject to Military Occupation.*

§ 714. Martial Law in Time of War.

Thus far the discussion has related to martial rule as exercisable in time of peace, that is, in times when, to be sure, civil disorder prevails, but when war—public war—does not exist. We have now to speak of martial rule when this latter condition is present.

It has already been learned that in war an enemy, be he a foreign one, or a rebel to whom the status of a belligerent has been given, has no legal rights which those opposed to him must respect.

When a civil contest becomes a public war, all persons living within limits declared to be hostile become *ipso facto* enemies, and subject to treatment as such.[5]

Different conditions prevail, however, in loyal districts. In these the existence of war does not operate to destroy or suspend the civil rights of the inhabitants.

Upon the actual scene of war, there is no question that, for the time being, the military authorities are supreme, and that these may do whatever may be necessary in order that the military operations which are being pursued may succeed. Here martial law becomes indistinguishable from military government. "When martial law is invoked in face of invasion or rebellion that rises to proportions of belligerency, it is war power pure and simple." [5a] It is in this sense that Field defines martial law as "simply military authority exercised in accordance with the laws and usages of war," and the Supreme Court defines it as "the law of military necessity in the actual presence of war." [6]

The necessities being great and extraordinary, the executive and administrative, that is to say, the military, action that will be justified is correspondingly extensive. But, the populace being loyal, and the territory domestic, private rights of persons and property still persist, though subject, as in all other cases, to the exercise of the police powers of the State. Those who exercise these powers, though military in character, still remain liable for any abuse of their authority. The civil courts are not necessarily closed, nor are any of the private actions of individuals subject to restraint except in so far as the efficiency of public service may require.

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[4] State *ex rel* Wadsworth v. Shortall (206 Pa. St. 165). See, also, Moyer v. Peabody (212 U. S. 78).

[5] Ford v. Surget (97 U. S. 594).

[5a] Berkheimer, *Military Law*, 2d. ed., p. 399.

[6] United States v. Diekelman (92 U. S. 520).

Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but a taking for the public use which, under the provision of the Fifth Amendment, demands that compensation be made. The manner of taking, however, may be that of the police power in that the urgency may not permit the ordinary proceedings for valuation and condemnation.[7]

§ 715. Exercise of Military Authority outside the Immediate Theatre of War: Ex Parte Milligan.

Under the stress of military exigency, upon the actual theatre of war such civil guarantees as the writ of habeas corpus, immunity from search and seizure, etc., may, of course, be suspended. As to this there is no question. There is, however, a serious question whether, when war exists, these rights may, by legislative act or executive proclamation, be suspended in regions more or less remote from active hostilities. This question was raised and carefully considered in the famous Milligan case[8] in which the Supreme Court was called upon to pass upon the authority of a military commission, during the Civil War, to try and sentence upon the charge of conspiracy against the United States Government one Milligan, who was not a resident of one of the rebellious States, nor a prisoner of war, nor ever in the military or naval service of the United States, but was at the time of his arrest a citizen of the State of Indiana in which State no hostile military operations were then being conducted.

The military commission had been created pursuant to an act of Congress of March 3, 1863, authorizing the suspension of the writ of habeas corpus throughout the United States by the President, but providing that lists of persons, not prisoners of war, held under military authority should be furnished within a given time to the Judges of the Federal circuit and district courts, and that one so imprisoned whose name was not so reported might appeal for release to the civil courts.

Five of the justices of the Supreme Court held that Congress was without the constitutional authority to suspend or authorize the suspension of the writ of habeas corpus, and to provide military commissions in States outside the sphere of active military operations and with their civil courts open and ready for the transaction of judicial business. The remaining four justices held that Congress had not in fact made legislative provision for the military tribunal in question, but asserted that it possessed the constitutional authority so to do, should it see fit.

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[7] United States v. Russell (13 Wall. 623). See also, Mitchell v. Harmony (13 How. 115).

[8] *Ex parte* Milligan (4 Wall. 2).

There would seem to be but little question that the doctrine stated by the majority in the Milligan case is essentially a sound one, namely, that actual necessity and not constructive necessity as determined by legislative declaration, alone will furnish justification for substituting martial for civil law. It would seem, however, that in one respect the opinion is open to criticism. The statement is too absolutely made that "martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." It is correct to say that "the necessity must be actual and present," but it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly point out, there may be urgent necessity for martial rule even when the courts are open. The better doctrine, then, is not for the court to attempt to determine in advance with respect to any one element, what does, and what does not create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption.

§ 716. Powers and Responsibilities of Military Commanders in Cases of Domestic Disorder.

It is to be observed, before leaving this point, that, so far as regards the legality of acts that may be done by military and civil authorities in effectuating their purposes, the necessity for them being present, there is no difference between the commander's powers in a domestic insurrection and in a war. There is, however, a vital distinction as to the power of the civil courts to question whether, in fact, such acts are justified by the necessities of the existing situation, and where such justification is found wanting to punish those committing them either civilly or criminally. As the Supreme Court of Pennsylvania in a leading case has said: "In truth he [the military agent] has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved." [9]

A case which emphasizes the extent of the martial powers that may be exercised by the civil authorities of a State in times of emergency is that of Moyer v. Peabody.[10] Here an action was brought by the plaintiff in error against a former governor of a State, and other State officers for an imprisonment suffered under their orders at a time when considerable disorder existed, and when the country had been declared in a state of insurrection and the State troops had been called upon to assist the civil authorities in the maintenance of law and order. The Supreme Court in its opinion, affirmed the order of the court below dismissing the complaint and affirmed the right of the civil authorities to make arrests, nor for purposes of punishment but to prevent the exercise of hostile acts.

It will be observed that in this case the court did not recognize a right upon the part of the military to establish courts for the trial and punishment of persons, but merely their right, as a preventive, precautionary, or police measure, to keep in custody, for the time being, persons who it was upon reasonable grounds believed were, by their actions, fomenting the disorder which the troops were endeavoring to put down. This detention was, therefore, essentially of the same nature as any other acts which the troops might take to the same end.[11]

Similar also to the holding of the Supreme Court in Moyer v. Peabody, was that of the Montana court in *Ex parte* McDonald.[12]

Although, in the opinion of the author, the Supreme Court was justified in its judgment in Moyer v. Peabody, the author is strongly of opinion that certain of the language of the court in that case was so unduly broad and unqualified as to make it possible to deduce from it a doctrine which, it may be confidently asserted, the Federal Supreme Court will not be willing to sanction.

In the well-considered case of Franks v. Smith [13] the Court of Appeals of Kentucky stated the relation of military to civil authorities, in times of domestic disorder, in language which, in the author's opinion, is much more satisfactory. In that case was contested the legality of an arrest, without authorization by the civil authorities, which had been made by members of the State militia which had been called out to control a condition of domestic disorder. To the contention that a member of the militia, when in active service, was not amenable to the civil authorities for acts committed in obedience to the orders of his military superiors, the court, while recognizing the constitutional right of the Governor of the State to call the militia to his aid in upholding the law and order of the State, when, in his judgment, he might deem it necessary or appropriate, declared that, when he does this, he acts in his capacity as a civil officer of the State and not as a military commander. "We have not, and cannot have, in this State a military force that is not and will not be subordinate to the civil authorities. The military cannot in any state of case take initiative or assume to do anything independent of the civil authorities. Ours is a government of civil, not military, forces. The militia in active service and in every emergency that arises in such service is subordinate to the civil power. The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates."

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[9] Commonwealth of Pennsylvania v. Shortall (206 Pa. 165).

[10] 212 U. S. 78.

[11] Similar was the action of the Colorado Supreme Court in *Re* Moyer (35 Colo. 159). In that case the court said: "If . . . the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to."

[12] 49 Mont. 454; 143 Pac. Rep. 947.

[13] 134 Southwestern Rep. 484, 488.

The court then went on to declare that the military, acting as peace officers, have only those powers to arrest which are recognized by the civil law, common or statutory, and that, this being so, the arrests which they had made, being without such authorization, constituted torts against the parties arrested for which damages might be assessed.[14]

§ 717. Liability of Soldiers Obeying Unjustified Commands of Their Superiors.

It is a general principle of American law that a subordinate cannot escape from civil or ciminal liability for illegal acts upon his part by pleading that they were committed under authorization by, or in pursuance of, a command by an administrative or executive superior. Upon the other hand, it is an equally imperative principle of military law that a subordinate shall render immediate obedience to a command of his military superior, failing which he is subject to summary punishment at the hands of the military authorities. There is thus presented the question as to what civil or criminal liability is incurred by a military subordinate who acts in obedience to a command of his military superior which that military superior is not legally authorized to give or is not justified in giving by the circumstances of the situation.

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[14] In State *ex rel.* Mays v. Brown (77 S. E. Rep. 243); and *Ex parte* Jones (77 S. E. Rep. 1029), doctrines with reference to martial law were declared, which, in the opinion of the author, are highly objectionable. Space cannot be spared for a discussion of these cases. For such a discussion the reader may consult the author's *Constitutional Law of the United States*, Vol. III, Sec. 1052. See also the articles by Charles Fairman, "The Law of Martial Rule" in 22 *American Political Science Review*, 591, and "Martial Rule and the Suppression of Insurrection" in *Illinois Law Review*, April, 1929.

The courts are divided in the answer which they have given to this question. Some of them have held the subordinate to strict accountability, notwithstanding the apparent injustice of so doing, perhaps relying upon executive pardons, or legislative reimbursements of fines or civil damages paid, for the correction of the injustice. Other courts, in order to meet the equities of the cases, have modified the rule of strict liability to the extent of holding that the subordinate is not to be held responsible when carrying out the command of his military superior when he has had no reasonable grounds for believing that his superior was acting in excess of his legal authority or without justification for the command given by him.

In general, it may be said that the courts have inclined towards this second and less rigorous doctrine even though it has meant a violation of legal logic, that is, the refusal to apply an acknowledged general principle of the civil law.[15] A leading case in support of this milder rule is that of Commonwealth of Pennsylvania *ex rel.* Wadsworth v. Shortall.[16]

The constitutional power of a legislature to enact curative measures which will protect public officials against prosecution for acts illegal when committed by them under color of official authority, and which the legislature might have constitutionally rendered legal, is well established.[17] A fairly recent holding to this effect is that of the Supreme Court in Tiaco v. Forbes.[18] In this case Governor General Forbes, acting in his official authority, had authorized the deportation of an alien from the Philippine Islands. It appeared that the Governor had not legal authority to do this, but, by subsequent enactment, the Philippine Legislature ratified his act. The Supreme Court held this enactment adequate to protect him against personal liability in the courts even though, at the time of the enactment, suits were pending to make him answerable in damages.[19]

Certain of the States have, by statute, sought to protect soldiers from civil and criminal actions based upon acts done by them in active military service and in pursuance of duty. Thus a Minnesota statute of 1913 [20] declares: "The commanding officer of any militia force engaged in the suppression of an insurrection, the dispersion of a mob, or the enforcement of the laws shall exercise his discretion as to the propriety of firing upon or otherwise attacking any mob or other unlawful assembly; and, if he exercise his honest judgment thereon, he shall not be liable in either a civil or a criminal action for any act done while on such duty."

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[15] 40 *Corpus Juris*, 707 (*sub. nom.* "Militia").

[16] 206 Pa. 165. See also McCall v. McDowell (15 Fed. Cas. No. 8673); *In re* Fair (100 Fed. Rep. 149); United States v. Lipsett (156 Fed. Rep. 65).

[17] Mitchell v. Clark (110 U. S. 633).

[18] 228 U. S. 549.

[19] Language was used by the court which indicates that the Governor General's act was viewed as an "Act of State." Unless a very broad definition is given to that term, it is difficult to see how the Governor General's act could be brought within its scope, for, used as a technical term, it applies only to acts committed by a public official outside the territorial jurisdiction of the State and against an alien.

§ 718. Habeas Corpus.

The writ of habeas corpus *ad subjiciendum* is one of a number of so-called extraordinary judicial writs, which, like those of certiorari, quo warranto, mandamus and injunction are issued by the courts in order either that their commands may be executed, or that a matter may be brought before them for judicial determination. This especial writ, often termed "the writ of liberty," had become one of the established rights of the citizen before the separation of the American colonies from the mother country, and has ever since been regarded by American citizens as the greatest of the safeguards erected by the civil law against arbitrary and illegal imprisonment by whomsoever the detention may be exercised or ordered. Issued as of right (*ex debito justitiæ*) [21] by any court of competent jurisdiction, it orders those to whom it is directed to show good legal justification for holding in custody the person in whose favor it is given. Where such sufficient cause is not shown an order of release follows as of course.[22]

§ 719. Suspension of the Writ.

The United States Constitution declares that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." [23] The implication from this language is that the writ shall not be suspended, except in the cases mentioned. The prohibition is directed only to the Federal Government. Aside, therefore, from the specific provisions of their several Constitutions, the States are free to suspend the writ, but in case they do so and without sufficient excuse, the person detained may, of course, obtain the writ from a Federal court under the claim that he is deprived of liberty without due process of law, or in derogation of some other Federal right, privilege or immunity.

The suspension of the privilege of the writ, it is to be observed, does not deprive the courts of the right to issue it. It furnishes merely a legal ground for a refusal to obey it.[24]

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[20] General Statutes, 1913, Sec. 2379.

[21] But not as of course, for the petition must set out a cause for its issuance.

[22] The jurisdiction of the Federal courts with reference to the issuance of the writ has been considered in an earlier chapter.

[23] Art. I, Sec. 9, Cl. 2.

Furthermore, the suspension of the writ goes no further than to justify this refusal. It thus enables executive agents to make arrests at will, and, while the suspension is in force, renders it impossible for those apprehended to obtain a judicial judgment upon the legality of such arrests and detention. But it does not operate actually to authorize such arrests,[25] or to deprive the individual of any of the other rights which the law secures him, and, therefore, the persons responsible for the arrests and detention may still be held civilly and criminally responsible for any illegal acts that they may have committed. In time of war, or of domestic insurrection or disorder, when so-called martial law has been declared, the privilege of the writ of habeas corpus, together with all the other civil guarantees may, for the time being, be suspended; but, as we have already learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this.

The existence of civil war operates as regards the enemy *ipso facto*, that is, without formal declaration, as a suspension of the privilege of the writ of habeas corpus, together with, as said, the suspension of the other guarantees to the individual against arbitrary executive action. In the preceding chapter the principle is argued that the establishment of martial law may properly take place not only upon the theatre of active hostilities, but elsewhere when the actual necessities of the case demand it.

The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law. The same reasoning, therefore, that was employed with reference to this latter subject is applicable to the question of the suspension of the writ of habeas corpus, and need not here be repeated.

§ 720. Power of the President to Suspend the Writ.

In *Ex parte* Bollman [26] the Supreme Court in its opinion took for granted that the power of suspension lay with Congress, and the same view was held by Story in his *Commentaries*.[27]

The correctness of this view does not appear to have been questioned until the early period of the Civil War, when President Lincoln, upon the advice of his Attorney-General, declared that the power lay with him, and by various proclamations authorized the suspension of the writ in places both within and without the area of active hostilities.[28]

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[24] *Ex parte* Vallandigham (1 Wall. 243).

[25] The four minority justices in the Milligan case asserted, though it would seem improperly, that the suspension of the writ does have this effect.

[26] 4 Cr. 75.

[27] Section 1336.

The rightfulness of this assumption of power by the President was severely criticized notwithstanding the arguments of the Attorney-General and of the eminent jurist Horace Binney. This criticism was judicially expressed by Chief Justice Taney in a protest which he filed in the case of *Ex parte* Merryman.[29]

That Taney's protest was well founded there would now seem to be little question. The point has never been since squarely passed upon by the courts, but, in 1863, Congress considered it necessary specifically to authorize the President to suspend the writ, and commentators now agree that the power to suspend or authorize the suspension lies exclusively in Congress. Winthrop in his *Military Law*, summing up his review of the subject, says: "Thus, as a general principle, it may be deemed settled by the rulings of the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the writ of habeas corpus, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress." [30]

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[28] For an able argument sustaining this position, see the three pamphlets issued in 1862, 1863 and 1865 by Horace Binney, entitled "The Principles of the Writ of Habeas Corpus." For other discussions see the article by Joel Parker, entitled "Habeas Corpus and Martial Law," in the *North American Review*, October, 1861; that by S. G. Fisher in the *Political Science Quarterly*, Vol. III, p. 454, entitled "The Suspension of Habeas Corpus during the War of the Rebellion" (criticizing Binney); the pamphlet "Executive Power," by B. R. Curtis, reprinted in the second volume of his *Life*, and also in the second volume of Curtis' *Constitutional History of the United States* (ed. 1896).

[29] Taney's Reports, 246.

[30] See also especially the argument by Tucker in his *Constitution of the United States*, II, pp. 642–652.

CHAPTER LXXV

THE SEPARATION OF POWERS

§ 721. The Separation of Powers.

A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government. The value of this principle or practice in protecting the governed from arbitrary and oppressive acts on the part of those in political authority, has never been questioned since the time of autocratic royal rule in England. That the doctrine should govern the new constitutional system established in 1789 was not doubted.

Under the influence of this doctrine most of the States in their first Constitutions incorporated what have since been known as "distributing clauses." Thus Massachusetts in her Constitution, adopted in 1780, provided that "in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise legislative and judicial powers or either of them; the judicial shall never exercise legislative and executive powers or either of them; to the end that it may be a government of laws and not of men." Maryland in her first instrument of government declared "that the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other," and New Hampshire provided that "the legislative, executive and judiciary powers ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."

In practically all of the State Constitutions which have been adopted since the revolutionary period there have been either distributing clauses similar to those given, or express provision that the legislative shall be vested in the legislature, the judicial in the courts, and the executive in the executive organs therein created. A number of Constitutions, however, are careful to state that the principle of absolute separation is not to apply in those cases in which express provision otherwise is made.

§ 722. Separation of Powers in the States Not Compelled by the Federal Constitution.

It is to be observed that this general acceptance by the States of the principle of the separation of powers is not one forced upon them by Federal law,[1] except in so far as the prohibition of the Fourteenth Amendment with reference to the depriving any person of life, liberty, or property without due process of law is operative or possibly, in extreme cases, where it might be held that the government is not republican in form. Nor, as we shall later see, do the distributing clauses in the State Constitutions operate to prevent the consolidation of judicial, executive, and legislative powers in local government organs.[2]

§ 723. Powers Separated in the Federal Government.

The Federal Constitution does not contain a specific distributing clause, but its equivalent is found in the clauses which provide that "all legislative powers herein granted shall be vested in a Congress of the United States," that "the executive power shall be vested in a President of the United States of America," and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

These provisions, interpreted in the light of the accepted doctrines that each and all of the Federal organs of government possess only those powers granted them by the Constitution, and that the powers granted may not by them be delegated to other and different organs, have, from the beginning, been held to secure what the specific distributing clauses in the State Constitutions are designed to provide. In the case of Kilbourn v. Thompson [3] the court said: "It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to governments, whether State or National, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." [4]

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[1] For an early statement of this see Calder v. Bull (3 Dall. 386). In Prentis v. Atlantic Coast Line Co. (211 U. S. 210), the court said: "We shall assume that when, as here, a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned." See also Dreyer v. Illinois (187 U. S. 71).

[2] *Cf.* Goodnow, *American Administrative Law*, p. 35.

[3] 103 U. S. 168.

To preserve the separation of powers and to render government efficient for the protection of civil liberty, the framers of our Federal and State Constitutions saw that it was necessary not simply to create separate depositaries for the three powers, but to provide means for preventing, if possible, the control by one department of the other departments. With this end in view the executive, legislative and judicial establishments were made as independent as possible of one another. Thus the legislatures are made the sole judges as to the constitutional qualifications of those claiming membership, they have the power of disciplining and expelling members, their members are in general not liable to arrest except for felony, treason or breach of the peace, and they may not be held responsible in actions of slander or libel for words spoken or printed by them as members. The independence of the courts is in general secured by tenures of office, and official compensation free from legislative control, and, furthermore, they have the great power of declining to enforce all laws or executive acts which they hold to be unconstitutional or otherwise illegal. The executive has, of course, within his own hands, the material force of the State, and, within the limits of the discretion placed by law within his hands, may not be held legally responsible in the courts for his acts.

§ 724. Separation of Powers Not Complete.

While, as has been said, the principle of the separation of powers has generally been accepted as binding in our systems of constitutional jurisprudence—State and National—the practical necessities of efficient government have prevented its complete application. From the beginning it has been necessary to vest in each of the three departments of government certain powers which, in their essential nature, have not belonged to it. Thus, to mention only a few of the more evident examples, the courts have been given the essentially legislative power to establish rules of practice and procedure, and the executive power to appoint certain officials—sheriffs, criers, bailiffs, clerks, etc.; the executive has been granted the legislative veto power, and the judicial right of pardoning; the legislature has been given the judicial powers of impeachment, and of judging of the qualifications of its own members, and the Senate, the essentially executive power of participating in the appointment of civil officials.

Not only this, but, as we shall later see, the principle of the separation of powers does not prevent the legislative delegation to executive officers of both a considerable ordinance-making power, and an authority to pass, with or without an appeal to the courts, upon questions of fact. Essentially, the promulgation of administrative orders or ordinances is legislative in character, and the determination of facts after a hearing is judicial. In both cases, however, these functions are performed in pursuance of statutory authority, and as incidental to the execution of law. In like manner, the legislature is conceded to have, as incidental to its law-making power, the essentially judicial function of punishing for contempt in certain classes of cases. It should, perhaps, be observed that inquiries as to the essential or inherent nature of specific powers are of so speculative a character that the courts in many cases have preferred to seek the guidance of historical precedent or of considerations of political expediency rather than the conclusions to be reached by pure reason. At times, however, the courts have been compelled to rely upon this last source for their determinations.

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[4] The principle of the separation of powers does not limit Congress when providing governments for the Territories, for, as to this, Congress has complete discretion.

§ 725. The General Principle Stated.

Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.

From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given.

Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.[4a]

§ 726. Distinction Between Legislative and Judicial Acts.

In Taylor v. Place [5] the court said: "The judicial power is exercised in the decision of cases; the legislature in making general regulations, by the enactment of laws. The latter acts from consideration of public policy; the former is guided by the pleadings and evidence in the cases."

[4a] For recent cases dealing with the separation of powers, see Hampton & Co. v. United States (276 U. S. 394, 406); and Springer v. Philippine Islands (277 U. S. 189, 201).

[5] 4 R. I. 324.

In Prentis v. Atlantic Coast Line Co.[6] the court said: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

In further distinction of the two functions it may be added that legislative action is initiated by the enacting body, whereas the judiciary may act only when called upon to do so, and that the former acts upon its own knowledge, the latter upon knowledge given to it.[7]

§ 727. Declaratory and Retroactive Legislation.

The foregoing distinctions support the doctrines that have been established with reference to the legislative enactment of declaratory and retroactive statutes.

Declaratory statutes, that is, those legislative pronouncements as to how certain laws, previously established, are to be interpreted by courts and by executive agents, are valid only in so far as they are designed to govern future action.

Retroactive legislation which does not impair vested rights, or violate express constitutional prohibitions, is valid, and, therefore, particular legal remedies, and, to a certain extent, rules of evidence, may be changed and, as changed, made applicable to past transactions, for it is held that, so long as the general requirements of due process of law are satisfied, no person has a vested right in any particular legal remedy or mode of judicial procedure.

Again, in certain cases, the legislature is competent to validate proceedings otherwise invalid because of formal irregularities. But substantial rights may not thus be interfered with.[8]

§ 728. Legislative Control of Judicial Procedure and Powers.

In order that the court may perform its judicial functions with dignity and effectiveness, it is necessary that it should possess certain powers. Among these is the right to issue certain writs, called extraordinary writs, such as mandamus, injunction, certiorari, prohibition, etc., and, especially, to punish for contempt any disobedience to its orders. The possession of these powers the courts have jealously guarded, and in accordance with the constitutional doctrine of the separation and independence of the three departments of government, have held, and undoubtedly will continue to hold, invalid any attempt on the part of the legislature to deprive them by statute of any power the exercise of which they deem essential to the proper performance of their judicial functions. The extent of their jurisdiction, they argue, may be more or less within legislative control, but the possession of powers for the efficient exercise of that jurisdiction, whether statutory or constitutional, which they do possess, they cannot be deprived of.

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[6] 211 U. S. 210.

[7] *Cf.* a paper entitled "The Distinction between Legislative and Judicial Functions," in *Report of the American Bar Association*, 1885, p. 261.

[8] Mitchell v. Clark (110 U. S. 633); Tiaco v. Forbes (228 U. S. 549).

§ 729. Jurisdiction and Judicial Power Distinguished.

It has been already pointed out that the jurisdictions of the inferior Federal courts and the appellate jurisdiction of the Supreme Court are wholly within the control of Congress, depending as they do upon statutory grant. It has, however, been argued that while the extent of this jurisdiction is thus within the control of the legislature, that body may not control the manner in which the jurisdiction which is granted shall be exercised, at least to the extent of denying to the courts the authority to issue writs and take other judicial action necessary for the proper and effective execution of their functions. In other words, the argument is, that, while jurisdiction is obtained by congressional grant, judicial power, when once a court is established and given a jurisdiction, at once attaches by the direct force of the Constitution.

This position was especially argued by Senators Knox, Spooner and Culberson and contested by Senator Bailey during the debate upon the Hepburn Railway Rate Bill of 1906. The point at issue was the constitutionality of the amendment offered by Senator Bailey providing that no rate or charge, regulation or practice, prescribed by the Interstate Commerce Commission, should be set aside or suspended by any preliminary or interlocutory decree or order of a circuit court.

This position would seem to be well taken, and would apply to attempts upon the part of Congress to specify the classes of statutes whose constitutionality may be questioned by the courts, or to declare the number of Justices of the Supreme Court who will be required to concur in order to render a judgment declaring the unconstitutionality of an act of Congress.

§ 730. Declaratory Judgments.

Elsewhere in this treatise is discussed the propriety of the practice of the Federal courts of testing the constitutionality of State statutes by means of injunction proceedings against the State officials charged with the execution of such statutes. It will there be seen that this practice, under certain circumstances, has been upheld. However, the Supreme

Court has not allowed this to be done except (1) when, as has been earlier said, the penalties imposed by the statutes for refusal to obey them are so severe as to make it unjust to ask that they be risked by the person who may, by his refusal to obey, desire to test the validity of the statutes, or, (2) when substantial interests of the petitioners for the injunction are directly and imminently threatened. When this is not the case, the court has considered that the proceedings are to obtain "declaratory" judgments upon its part—which class of judgments it has consistently declined to give.[9]

Examining the cases which are cited in the footnote it is seen that two tests have been stated as to the judicial character of action asked of a court: First, that execution upon the order of the court of the judgment or decree that may be rendered is possible; and second, that the parties litigant will be conclusively bound by such final judgment or decree. As regards the first of these it is admitted that it need not be always present; that is, that there are classes of cases, essentially judicial in character, such as those mentioned by the court in Fidelity National Bank and Trust Co. v. Swope[10] in which judgments or decrees are entered upon which no writs of execution are required or expected to be issued.

In the State courts there have been a considerable number of cases examining their right under State statutes, as tested by their respective State Constitutions, to render declaratory judgments. A leading State case as to this is that of Anway v. Grand Rapids R. Co.,[11] decided in 1920. In that case the majority refer to and quote from Muskrat v. United States[12] and say: "This case should forever put at rest this question [that a declaratory judgment may not be rendered]. It is absolutely decisive of the question before us."[13]

§ 731. Advisory Opinions and Declaratory Judgments Distinguished.

Earlier in this treatise, the refusal of the Supreme Court to render "Advisory Opinions" has been discussed.[14] An advisory opinion, as distinguished from a declaratory judgment, is one that is rendered by a court at the request of an executive or legislative organ of the government, and not in a "case" presented to the court.[15]

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[9] Mass. State Grange v. Benton (272 U. S. 525); Liberty Warehouse v. Grannis (273 U. S. 70); Fidelity National Bank & Trust Co. v. Swope (274 U. S. 123); Gordon v. United States (2 Wall. 561).

[10] 274 U. S. 123.

[11] 211 Mich. 592; 179 N. W. Rep. 350.

[12] 219 U. S. 346.

[13] There was a strong dissent in this case and the majority position has not met with full approval by the bar. For general discussions of the desirability, as well as the constitutionality, of declaratory judgments, see the following articles in the law journals: 28 *W. Virginia Law Quarterly*, 1; 35 *Yale Law Journal*, 473; 9 *Virginia Law Review*, 169; 56 *American Law Review*, 659; 15 *American Political Science Review*, 261; 16 *Illinois Law Review*, 436; 10 *California Law Review*, 158.

[14] See § 17.

§ 732. Powers of Courts to Punish Contempts.

Within recent years the question of the constitutional extent of the legislative control over the powers of the courts has been discussed with especial reference to the regulation of the courts' power to punish for contempt, and to issue writs of injunction.[16]

That, generally speaking, the power to punish for contempt is inherent in courts is beyond question. It may, however, be argued that where the existence and jurisdiction of a court are wholly within the control of the legislative body, as is the case with the inferior Federal courts, authority exists in the legislature to determine the circumstances under which contempt may be held to have been committed, the form of trial therefor, and the punishment which, upon conviction, may be inflicted. The power has, indeed, in a measure, been exercised by Congress, which, by law of March 2, 1831,[17] limited the contempt powers of the Federal courts to three classes of cases: (1) Those where there has been misbehavior in the presence of the court, or so near thereto as to interfere with the orderly performance of its duties; (2) where there has been misbehavior on the part of an officer of the court with reference to official transactions; and (3) where there has been disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court.[18]

The general character of this statutory provision of 1831, and its relation to the present Section 268 of the Judicial Code was considered in Toledo Newspaper Co. v. United States.[19]

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[15] "Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented. The decision of a moot case is mere dictum, as no rights are affected thereby, while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested parties." Dissenting opinion of Judge Sharp in Anway v. Grand Rapids R. Co. (211 Mich. 592); 179 N. W. Rep. 350.

For an excellent discussion of advisory opinions, see A. R. Ellingwood, *Departmental Coöperation in State Government*, published in 1918.

[16] *Cf. Harvard Law Review*, XIII, 615, article, "Constitutional Regulation of Contempt of Court," by Wilbur Larremore.

[17] 4 Stat. at L. 487. See also, *ante*, § 561, as to the provisions of the Clayton Act of October 15, 1914. 38 Stat. at L. 730.

[18] *Cf. Ex parte* Robinson (6 McLean, 355). As to cases coming constructively within the first of the three classes noted in the text, see dissenting opinion of Justice Holmes in Craig v. Hecht (263 U. S. 255).

[19] 247 U. S. 402.

In Gompers v. Buck's Stove and Range Co.[20] with reference generally to the power to punish for contempt, the court said: "While it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory. . . . There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal, or to a jury in the same tribunal. . . . Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants." [21]

The foregoing had reference to contempt proceedings based upon refusal of parties to obey orders of the court, and it is quite clear from the language of the court that, in such contempt proceedings, the court will not recognize the validity of legislative attempts to limit its powers in the premises or the mode and manner in which it is to be exercised. The situation is perhaps different as regards contempt proceedings based upon acts in disturbance of the dignity, decorum or the efficient conduct of the proceedings of the court.

It may also be noted that the Gompers case is authority for the proposition that a person held in contempt because of a refusal upon his part to obey a mandate of the court cannot justify his refusal by alleging the invalidity of the disobeyed order, unless that invalidity is due to the lack of jurisdiction upon the part of the court to issue the writ. The court, as to this, said: "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." In Howat v. State of Kansas [22] the court was still more explicit, and said: "An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void, law, going to the merits of the case." And, later: "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

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[20] 221 U. S. 418, 450.

[21] Citing Bessette v. W. B. Conkey Co. (194 U. S. 324).

[22] 258 U. S. 181, 189.

In Michaelson v. United States [23] in which the court was called upon to construe the provisions of the Clayton Act with reference to contempts, the court, as has been earlier pointed out,[24] upheld these provisions as applying only to criminal contempts. As to such contempts the court declared that its discretion was incidental and subordinate to the dominating penal purpose of the proceedings, and, therefore, that the proceeding might be regulated by statute without impairing the inherent and necessary scope of the judicial power possessed by the court. The attributes which inhere in and are inseparable to the judicial power, the court declared, could not be abrogated or rendered practically inoperative by Congress. "If," said the court, "the reach of the statute had extended to the cases which are excluded a different and more serious question would arise."

§ 733. Congressional Power to Restrict the Scope of Charges to the Jury by Federal Judges.

There has been some agitation to obtain from Congress a statute providing that it shall be deemed reversible error for Federal trial judges in jury cases to express their opinion as to the credibility of witnesses or as to the weight of evidence.

The constitutionality of such a measure may well de doubted, and its advisability questioned. Such a statutory declaration as to the exercise by the courts of their powers would seem to approach very near to, if not actually to invade, the sphere of judicial authority which is invested by the Constitution exclusively in the Federal courts.[25] This point has never been expressly passed upon by the courts, since the measure has not obtained enactment. However, in Nudd v. Burrows,[26] in which the court was called upon to consider the act of Congress of June 1, 1872, known as the "Conformity Act" [27] we find the court saying: "There are certain powers inherent in the judicial office. How far the Legislative Department of the Government can impair them, or dictate the manner of their exercise, are interesting questions, but it is unnecessary in this case to consider them." Also, in Capitol Traction Co. v. Hof,[28] it is pertinent to note that the court described the right to jury trial which is constitutionally guaranteed as one of the twelve men "under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."

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[23] 266 U. S. 42.

[24] See *ante*, § 363.

[25] As to this see the able brief of Mr. T. W. Shelton before the Senate Judiciary Committee at its hearing of November 10, and 22, 1915.

[26] 91 U. S. 426.

[27] 17 Stat. at L. 197.

[28] 174 U. S. 1.

§ 734. Power of Federal Courts to Suspend Sentences.

Judicial circles were considerably surprised in 1916 by the decision of the Supreme Court, in *Ex parte* United States,[29] that a Federal District Court, having no statutory authorization so to do, had no power to order the indefinite suspension of the execution of a sentence of imprisonment imposed by it. The argument of the Supreme Court that such a right is not included within the judicial power was founded upon the proposition that the power to enforce a law does not include the power permanently to refuse to do so.

In its opinion the Supreme Court denied that the right in question was sanctioned as a judicial one by the common law, or by the adjudications of State and Federal courts, although it was recognized that, as to the State courts, there was a conflict of decisions.[30] The Supreme Court further recognized that the power in question had, in fact, been many times exercised by both Federal and State courts, but this practice, the court declared, had been by no means a universal one, and, in any event, it could not operate to override the court's judgment as to the essential unconstitutionality of the practice.[31]

§ 735. Parole Law of 1925.

By act of March 3, 1925,[32] Congress has expressly given to the Federal courts, except in the District of Columbia, the power to suspend sentences and to place convicted persons upon parole. The act enters into some details as to the manner in which the parole system thus provided for shall be administered, but its essential provision with reference to granting authority to the courts is the first paragraph of Section 1 which reads: "That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years." [33]

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[29] 242 U. S. 27.

[30] The decision of the District of Columbia court in Miller v. United States (41 App. D. C. 52)(1913) sustaining the court's right to suspend sentence was declared by the Supreme Court to have been demonstrated to be unsound by the Supreme Court's reasoning in the instant case.

[31] For a general discussion of the power of courts to suspend sentences, see the article by Professor A. A. Bruce, "The Power to Suspend a Criminal Sentence for an Indefinite Period or During Good Behavior," in 6 *Minn. Law Review*, 363.

[32] 43 Stat. at L. 1259.

§ 736. Pardoning Powers of the President and Contempts.

Arguing from the general principle of the independence of the three departments of government it would seem that the question as to the power of the President to pardon persons adjudged by one of the Federal courts to be in contempt should be answered in the negative, for clearly to give this power to the executive is to place in his hands a weapon with which he may completely nullify the court's power to enforce its decrees. To this it may be replied, however, that, having the direction of the armed forces of the nation he has the power in any event, and the Constitution vesting in him the general power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," it would seem to follow that the power to remit the punishment of those convicted by the Federal courts of contempt is given.

With reference to this, however, there is a distinction to be made between criminal contempts and so-called civil contempts. In civil contempts the defendant is fined or imprisoned in order to obtain for a suitor his private rights. Punishment for criminal contempts, upon the other hand, is imposed to uphold and vindicate the dignity of the court. Though the Supreme Court has never passed directly upon this point, there would seem to be no doubt but that the pardoning power of the President extends at least to persons punished for criminal contempts. In 1902 in *Re* Nevitt [34] the Circuit Court of Appeals for the eighth circuit held that the President might pardon criminal contempts, and intimated that the same was true as to civil contempts. This last would seem to be a doubtful doctrine. Attorneys General Gilpin and Mason have both held that the President may pardon criminal contempts,[35] and this was expressly held by the Supreme Court in *Ex parte* Grossman in an elaborate opinion.[36]

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[33] As to the possible unconstitutionality of this law as an invasion of the President's power to pardon, see the article "The Constitutionality of the Federal Parole Law" by A. K. McNamara in 45 *American Law Review*, 401.

[34] 117 Fed. Rep. 448.

[35] Dixon's case (3 Op. Atty. Gen. 662; 4 Op. Atty. Gen. 458). See *Columbia Law Review*, III, 45.

[36] 267 U. S. 87.

Where the point has been raised in the State courts, they have with unanimity held that the governor has the power in question.[37]

§ 737. The Performance of Administrative Acts by the Courts.

Courts have no hesitation in performing ministerial acts if such acts are incidental to the exercise of their proper judicial functions. But they will not perform administrative acts not so connected.

In Hayburn's case [38] the Federal Circuit Judges before whom the question was raised unanimously refused, as directed by an act of Congress, to inquire into and to take evidence as to the claims of invalid pensioners and to submit their findings for final action to the Secretary of War, on the ground that inasmuch as their acts were made reviewable by an executive officer they could not be deemed judicial in character.

In United States v. Ferreira [39] the Supreme Court held that an act of Congress which gave to the District Judge of Florida the authority to pass upon certain claims, which decisions were to be reported to the Secretary of the Treasury for his discretionary action thereupon, gave to such judge not judicial but administrative powers, and, therefore, that, when so acting, he sat as a commissioner and not as a court, and, consequently, that an appeal would not lie from his decisions to the Supreme Court.

In the case of Gordon v. United States [40] the Supreme Court refused to review the action of the Court of Claims in respect to a claim examined and allowed by it under an act of Congress which provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims until after an appropriation therefor had been estimated by the Secretary of the Treasury and an appropriation to pay it made by Congress. The appeal of Gordon was dismissed on the ground that Congress could not "authorize or require this [the Supreme] court to express an opinion in a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." [41]

The courts will not exercise powers which they deem essentially legislative in character. For example, while they assert their right, in proper cases, to declare illegal specific rates fixed by administrative or legislative bodies, they will not themselves declare what the proper rates shall be, for it is established that rate-making is an essentially legislative function. Thus, in Keller v. Potomac Electric Power Co.[42] which was a case on appeal from a decision of the Court of Appeals of the District of Columbia which was concerned with a comprehensive Public Utilities Law of Congress for the District, the Supreme Court recognized that, having exclusive jurisdiction over the District of Columbia, Congress had the same constitutional authority that the States have (so far as the Federal Constitution is concerned) to disregard the principle of the Separation of Powers and therefore vest the performance of legislative or administrative functions in the courts, but that Congress could not vest in the Federal Supreme Court by appeal or otherwise, such authority. The Section (64) of the Public Utilities Law in question which gave this authority was therefore held invalid so far as it related to appeals to the Supreme Court.

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[37] See Sharp v. State (49 S. W. Rep. 752), where the authorities are cited.

[38] 2 Dall. 409.

[39] 13 How. 40.

[40] 2 Wall. 561.

[41] *Cf. In re* Sanborn (148 U. S. 222). An interesting case in the Court of Appeals of New York is that of Matter of Richardson (247 N. Y. 401) which has to do with the performance of administrative acts by the courts. Judge Cardozo, C. J., in the course of his opinion, (p. 413) says, "no doubt there are peripheral zones where the judicial and administrative merge into each other. . . . The hinterland may be plain when the frontier is uncertain."

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[42] 261 U. S. 428.

CHAPTER LXXVI

THE DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE OFFICIALS OR AGENCIES

§ 738. Delegated Power May Not Be Delegated.

"One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by that constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." [1]

The principle as thus absolutely stated is subject to one important exception, and to several qualifications, or at least explanations.

§ 739. Local Governing Powers May Be Delegated.

The exception is with reference to the delegation of powers to local governments. The courts have held, as to this, that the giving by the central legislative body of extensive law-making powers with reference to local matters to subordinate governing bodies being an Anglo-Saxon practice, ante-dating the adoption of the Constitution, and the right of local self-government being so fundamental to our system of politics, our Constitutions are, in the absence of any express prohibitions to the contrary, to be construed as permitting it.[2]

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[1] Cooley, *Constitutional Limitations*, 7th ed., 163.

[2] "It seems to be generally conceded," the court said in State v. Noyes (30 N. H. 279), "that powers of local legislation may be granted to cities, towns, and other municipal corporations and it would require strong reasons to satisfy us that it could have been the design of the framers of our Constitution to take from the legislature the power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all the other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of the most valuable institutions." *Cf.* Cooley, *Const. Lim.*, 7th ed., 265, note, and authorities there cited.

§ 740. Power to Issue Administrative Ordinances May Be Delegated. The qualifications to the rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities: (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised; and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met, and the rights therein created to be enjoyed.

The principle which permits the legislature to provide that the administrative agent may determine when the circumstances are such as require the application of a law is defended upon the ground that, at the time this authority is granted, the rule of public policy, which is the essence of the legislative act, is determined by the legislature. In other words, the legislature, as it is its duty to do, determines that, under given circumstances, certain executive or administrative action is to be taken, and that, under other circumstances, different or no action at all is to be taken. What is thus left to the administrative official is not the legislative determination of what public policy demands, but simply the ascertainment of what the facts of the case require to be done according to the terms of the law by which he is governed. Thus in Locke's Appeal [3] the court said: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." [4]

The doctrine thus declared is without objection so long as the facts which are to determine the executive acts are such as may be precisely stated by the legislature and certainly ascertained by the executive. When this is not so, the officer intrusted with the execution of the law is necessarily vested with an independent judgment as to when and how the law shall be executed; and when this independence of judgment is considerable there is ground for holding that the law is not simply one *in præsenti* to take effect *in futuro*, but is a delegation of the law-making body of its legislative discretion. This was one of the points especially urged in the leading case of Field v. Clark.[5] By the third section of the Tariff Act of October 1, 1890, it was provided that, with a view to securing reciprocal trade, "whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such times as he shall deem just."

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[3] 72 Pa. St. 491.

[4] Quoted and approved in Field v. Clark (143 U. S. 649).

The provisions which have been quoted, it was argued, exhibited an endeavor on the part of Congress to vest in the President an unconstitutional discretionary power as to when certain taxes should and when they should not be levied and collected. The Supreme Court, however, upheld the grant of power, saying, with reference to the provision in question: "It does not, in any real sense, invest the President with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea, or hides produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President."

The question when an administrative discretion is so broad as to amount to a legislative power is one that may not be answered according to any fixed formula, but one that has to be answered in each individual case according to the judgment of the court. During recent years, with the increase of governmental functions, both in number and complexity, and especially with the extension of the law's control over matters of industrial and technical interest, the delegation to administrative agents and in particular to boards or commissions, of wide spheres of discretionary action, has become a necessity. This in turn has given rise to a very great number of cases in both the Federal and State courts in which it has been alleged that legislative power has been unconstitutionally delegated. In this treatise it will be clearly impossible to consider more than a few of the more recent and more important cases in which the question has been considered by the Supreme Court of the United States.

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[5] 143 U. S. 649.

These will, however, be sufficient to illustrate and exhibit the general principle.

In Buttfield v. Stranahan[6] decided in 1904, the court held valid the grant by Congress to the Secretary of the Treasury of authority to establish standards, upon recommendation of a board of experts, by which should be determined the purity, quality and fitness for consumption of teas sought to be exported into the United States, and to exclude from importation such teas as should not satisfy these requirements as provided by law.

In Union Bridge Co. v. United States,[7] decided in 1907, the general doctrine relating to the delegation of legislative power was again extensively considered, the court in that case sustaining the constitutionality of a statutory grant to the Secretary of War of authority to require changes or alterations in bridges over navigable water-ways of the United States when, after a hearing of the parties interested, he is satisfied that the structure as erected or contemplated constitutes or will constitute an unreasonable obstruction to navigation. After a review of the cases, the court declared the statute in entire harmony with the principles announced in them. To deny to Congress the authority thus to delegate to the executive branch of the government the exercise in specific instances of a discretionary power which, from the nature of the case, Congress could not itself exercise, would be, the court said: "to stop the wheels of government, and bring about confusion, if not paralysis, in the conduct of the public business."[8]

In St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor[9] it was held that legislative power had not been granted to the American Railway Association and the Interstate Commerce Commission by the Safety Appliance Act of 1893, which requires the use of only such cars as have drawbars of uniform height, and empowers the Association to fix and the Commission to declare, the standard.

§ 741. Delegation of Rate-Making Powers.

That the fixing of the rates or charges that may be collected by public service corporations for the services rendered by them is, primarily at least, a legislative function, is so well established that the citation of authorities is scarcely necessary.[10] Indeed, it was originally held in

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[6] 192 U. S. 470.

[7] 204 U. S. 364.

[8] The requirement that alterations shall be made is not, the court went on to hold, a taking of private property for public use, for which compensation must be made, but is a proper measure incidental to the regulation of commerce among the States.

[9] 210 U. S. 281.

[10] In Atlantic C. L. R. Co. v. North Carolina Corp. Com. (206 U. S. 1) a long list of cases as to this are cited in a footnote.

Munn v. Illinois [11] that this power was so exclusively legislative that the validity of the laws in regulation of business affected with a public interest could not be questioned by the courts under the due process of law clauses of the Constitution.[12]

In the States the delegation by the legislative body, to commissions or other boards, of authority to fix rates has been generally sustained where by law general principles have been established for the guidance and control of these administrative bodies in the exercise, in specific instances, of their rate-making powers.

In a number of instances these laws have come before the Supreme Court of the United States, but not in such a way as to compel that court to pronounce squarely upon their constitutionality as tested by the principle that legislative power may not be delegated by the law-making body to an administrative board or commission. And, indeed, this is a question of State constitutional law with which the Federal courts have no concern. It is only when the allegation is made that the rates as fixed, whether directly by the legislature or by another authority, are unreasonable, and, therefore, operate to deprive either the railway or the shipper of property without due process of law, that a Federal question is raised.

That a considerable amount of regulative control over railways may constitutionally be delegated to the Interstate Commerce Commission has not been disputed. It was not until the act of 1906, however, that that body was intrusted by Congress with the authority to fix in specific instances the rates that interstate railways might charge. By that law it is provided that the rates which these companies may legally fix, or which may be fixed for them by the Commission, must be "just and reasonable." This is, practically, the only principle legislatively laid down for the guidance and control of the Commission. That the extensive discretionary power thus vested in the Interstate Commerce Commission is not legislative in character has been declared by the courts.[13]

§ 742. Flexible Tariff. Is Legislative Power Delegated to the President?

The purpose of a Flexible Tariff, so called, is to enable customs duties fixed by Congress to be raised or altered by executive action as to specific articles as circumstances may seem to make desirable. Provision to this effect was made by Congress in Section 315 of the Tariff Act of September 21, 1922, which read, in part: "Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same." [14]

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[11] 94 U. S. 113.

[12] See § 771.

[13] See § 329.

The constitutionality of this delegation of authority to the President was upheld by the United States Customs Court (then known as the Board of General Appraisers) in the case of Hampton v. United States,[15] and the decision therein rendered affirmed by the Court of Customs Appeals.[16]

Upon certiorari, the Supreme Court affirmed the judgment of the Court of Customs Appeals,[17] saying: "Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorized a member of the executive branch to carry out its policy." And, later: "What the President was required to do was merely in execution of the act of Congress. It was not the making of law."

In United States v. Chemical Foundation [18] it was held that there had not been attempted by the Trading with the Enemy Act of October 6, 1917,[19] an unconstitutional delegation of legislative power by reason of the authority vested in the President with regard to sales of properties seized. The act provided that all dispositions by sale or otherwise should be in accordance with the determination of the President, with the proviso that any property sold under the act, except when sold to the United States, should be sold only to American citizens at public sale to the highest bidder, unless the President, stating his reasons therefor, in the public interest should otherwise determine.

§ 743. Administrative Ordinances.

The authority that administrative agents may constitutionally exercise in the promulgation of rules and ordinances regulating in detail the execution of the laws the enforcement of which has been placed in their hands, and the legal force to be given to these rules thus administratively established, have given rise to many adjudications. These rules, it is to be observed, fall into two general classes. First, those established by an administrative superior and directed solely to the administrative inferior; secondly, those binding of course the administrative inferiors, but primarily directed to the private citizen, and fixing the manner in which the requirements of the statute are to be met by him. This second class of rules is, in turn, divisible into two classes; those to which a criminal penalty is attached for their violation, and those merely defining the manner in which rights created by the statute are to be enjoyed.

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[14] The other provisions of this Section relate to the modes in which the differences in costs of production are to be ascertained, the considerations to be taken into account, etc. *Cf.* § 336 of Tariff Act of June 17, 1930.

[15] Treasury Decisions, No. 41478, April 6, 1926.

[16] No. 2761, in March, 1927.

[17] Hampton v. United States (276 U. S. 394, 405, 410, 411).

[18] 272 U. S. 1.

[19] 40 Stat. at L. 411. Amended March 28, 1918 (40 Stat. at L. 460).

The first of these two main classes of administrative ordinances differs from those of the second class in that, though valid as between the administrative superior and his inferior, they do not create legal rights which the private citizen may enforce in the courts. Of this class, for example, are certain of the civil service regulations which the Presidents of the United States have issued under authority of the Civil Service Acts, fixing the classes to be included in the "classified service," providing for examinations for admission to the service, and declaring the conditions under which promotions and removals may be made.

As to those rules or ordinances, established by executive agents, providing the modes under which private persons may receive the privileges granted by law or be held responsible for violations of the duties imposed therein, it may in general be said that the executive may establish all special regulations that fall within the general field of the authority granted by law, and which are reasonably calculated to secure the execution of the legislative will as laid down in the statutes.

With reference to many of the Army and Navy Regulations issued by the President it is to be observed that these derive their force not from congressional authorization, but directly from the constitutional power of President as Commander-in-Chief of the Army and Navy; and this, too, notwithstanding the constitutional provision that Congress may make rules for the government and regulation of the land and naval forces. In the early case of United States v. Eliason [19a] the court said: "The power of the executive to establish rules and regulations for the government of the army, is undoubted. . . . Such regulations cannot be questioned or defied because they may be thought unwise or mistaken."

§ 744. Penal Ordinances.

The courts scrutinize with especial care those cases in which a criminal action is based upon the violation of an administrative order. It is not questioned that the legislature may attach a criminal liability to the violation of an administrative order, but in each case it must clearly appear that the order is one which falls within the scope of the authority conferred. Thus, while there are many cases in which it has been held that the delegation of an ordinance-making power to the executive is not a delegation of legislative power, there are comparatively few cases in which has been sustained the right of an administrative officer to establish an ordinance the violation of which will be punished criminally. In United States v. Maid [20] the court said: "A department regulation may have the force of law in a civil suit to determine property rights, . . . and yet be ineffectual as the basis of a criminal prosecution. . . . The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial function."

[19a] 16 Pet. 291, 301, 302.

In Oceanic Steam Navigation Co. v. Stranahan [21] the court upheld the validity of a statutory provision authorizing the Secretary of Commerce and Labor to levy and collect a money penalty from the steamship companies for bringing into the United States aliens affected with loathsome or dangerous contagious diseases. This the court did, however, upon the theory, based, it must be admitted, upon a very liberal interpretation, that the fines authorized to be collected were not penal in character, but an administrative means "to secure the efficient performance by the steamship company of the duty to examine [the immigrants] in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress."

That the exaction of a penalty by an administrative officer is necessarily governed by the rules controlling the prosecution of criminal offences, was denied. The doctrine declared in Wong Wing v. United States [22] was, therefore, held not to apply.

In Fong Yue Ting v. United States [23] it had been held that the right to exclude or to expel aliens, absolutely or upon conditions, being an inherent and inalienable right of a sovereign and independent nation, Congress had the power to expel as well as to exclude undesirable immigrants, and that this power might be exercised entirely through executive officers. A substantially similar position was taken by the court in Lem Moon Sing v. United States.[24] In the Wong Wing case, however, the court held that Chinese persons might not be imprisoned at hard labor upon order, without trial by jury, of a United States officer acting under the authorization of the provision of the law of 1892 that

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[20] 116 Fed. Rep. 650. *Cf.* United States v. Eaton (144 U. S. 677); United States v. Bailey (9 Pet. 238); *Ex parte* Kollock (165 U. S. 526).

[21] 214 U. S. 320, 337.

[22] 163 U. S. 228, 233, 237.

[23] 149 U. S. 698.

[24] 158 U. S. 538.

"any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." The court, while holding that the detention or temporary confinement of alien immigrants at the instance of administrative agents might be necessary and was allowable as a means for giving effect to the policy of Congress as established by law, declared that imprisonment at hard labor is an infamous punishment which may be constitutionally ordered only after indictment and trial by jury and in a court of justice. "It is not consistent with the theory of our government," the court declared, "that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

By the Railway Rate Act of 1906 the Interstate Commerce Commission is authorized to issue various orders with reference to the conduct of their business by interstate carriers, and provision is made that violations of these orders shall be punishable by fines and forfeitures which may be recovered in civil suits in the name of the United States.

By various acts of Congress the Secretary of Agriculture has been given power to establish rules for regulating the use and occupancy of public forest reservations and for preserving such forests from destruction. Under this authority rules or regulations have been issued by the Secretary. The lower Federal courts have divided as to whether violations of the regulations thus issued may be treated as crimes. The question came before the Supreme Court in United States v. Grimaud [25] and was answered in the affirmative. In its opinion the court pointed out that, from the nature of things, it was impracticable for Congress itself to provide regulations for the various and varying details of forest management and that the authority actually conferred related to matters of purely local management and was less than that granted by State legislatures to municipalities by virtue of which they make by-laws, ordinances, etc., for the government of towns and cities, the violations of which are punished as penal offences. As to the holding of the court in United States v. Eaton,[26] the court pointed out that in that case it was held that while Congress might have made punishable the violation of the orders which the administrative agency was authorized to issue, it had not, in fact, done so, and, therefore, that the administrative agency could not so provide. In the instant case, however, Congress had provided in the Forest Reserve Act that "any violation of the provisions of this Act or such rules and regulations (of the Secretary of Agriculture) shall be punished" as prescribed in Section 5388 of the Revised Statutes as amended.

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[25] 220 U. S. 506.

[26] 144 U. S. 677.

§ 745. The Referendum as a Delegation of Legislative Power.

The subject indicated by the heading to this Section, though not one falling within the subject stated in the title to the present chapter, may, as involving a matter of delegation of legislative power, be here considered.

Whether or not a State ceases to have a government republican in form by adopting the initiative and the referendum for purposes of legislation has been declared by the Supreme Court to be a political question the determination of which lies solely with Congress.[27] Whether or not the adoption of these devices by the States operate as an unconstitutional delegation of legislative power is a question for the courts of the States concerned to determine in accordance with their own judgments and the specific requirements of their own Constitutions. Though thus not, as yet at least, a matter of Federal constitutional importance it may be said that the weight of authority would seem to be against the validity of statutory provisions for the submission to the electorate of the State of the question as to whether a measure shall or shall not become a law.[28] In answer to the point that the law-making power was not thus transferred, but simply the operation of the statutes in question made dependent upon the happening of a particular event, namely, the approving vote of the people, the court of New York, in Barto v. Himrod [29] said: "It is not denied that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. But such a statute, when it comes from the hands of the legislature, must be a law *in præsenti* to take effect *in futuro*. . . . The event or change of circumstances on which a law may be made to take effect must be such as in the judgment of the legislature affects the question of the expediency of the law: an event on which the expediency of the law, in the judgment of the lawmakers, depends. On this question of expediency, the legislature must exercise its own judgment definitively and finally. . . . But in the present case no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free school act, abstractly considered, did not depend on a vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was made to take effect was nothing else than the vote of the people on the identical question which the Constitution makes it the duty of the legislature itself to decide." The case of Barto v. Himrod was decided in 1853 by the Court of Appeals of New York. Since then that court, in People *ex rel.* Unger v. Kennedy,[30] has said (p. 545): "Starting with and fully accepting the elementary proposition involved in and decided by the Barto case, we find that subsequent decisions have declared that the doctrine of that case should not be pushed beyond the question there involved and that the legislature may pass a statute which is a completed law affecting or conferring rights upon a restricted locality but to become operative only in the event of an affirmative vote by the people of such locality."[31]

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[27] Pacific States Telephone and Telegraph Co. v. Oregon (223 U. S. 118).

[28] *Cf. In re* Municipal Suffrage (160 Mass. 586); Santo v. Iowa (2 Ia. 165); Oberholtzer, *The Referendum in America*, and Cooley, *Constitutional Limitations*. See the important case of Eckerson v. City of Des Moines, (115 Northwestern Reporter, 177).

[29] 4 Seld. 483, 490, 491.

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[30] 207 N. Y. 533.

[31] While, as indicated, direct legislation laws of a general character have at times been held unconstitutional, special referendum, or local option, laws, have been held valid, the point being taken, among others, that at the time the Federal and State Constitutions were adopted, measures of this character were generally recognized as proper, and construed to provide for delegation of local governing, rather than legislative, powers. Thus Cooley, summing up the argument upon this point, says: "It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation [liquor laws, etc.] usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of state policy or dangers of local abuse to warrant the interposition." *Constitutional Limitations*, 7th ed., p. 264. In the earlier cases (Wales v. Belcher, 3 Pick. 508; Goddin v. Crump, 8 Leigh, 120; Burgess v. Pue, 2 Gill, 11) general referendum laws were sustained, but since the decision of the Delaware court in 1847 (Rice v. Foster, 4 Harr. 479) the general practice, as indicated in the text, has been to hold them void as a delegation of legislative power.

CHAPTER LXXVII

THE DELEGATION OF JUDICIAL POWER TO ADMINISTRATIVE OFFICIALS OR AGENCIES

§ 746. Quasi-Judicial Functions of Administrative Bodies.

The preceding chapter has dealt with the extensive regulatory powers that may be vested in administrative officials or agencies without violating the constitutional principle that the exercise of powers vested in Congress may not, by that body, be delegated to other agencies.

In the exercise of their discretionary powers administrative agencies not only issue regulations, or ordinances, which have the force of law, but issue commands to individuals in specific cases brought to them or initiated by them *ex proprio motu.* Also, in many cases, the administrative agencies institute inquiries or carry on investigations in order to determine, upon a basis of fact, what regulations or ordinances it will be proper and expedient for them to issue; and, for the making of such inquiries, they have been invested by the legislature, either expressly or by implication, with authority to issue compulsory processes in order to obtain the presence of witnesses, to compel testimony upon their part, and to produce documents and other kinds of evidence.

The hearings or investigations thus carried on are judicial to the extent that they are similar to the activities of the courts of law when securing necessary evidence in the cases litigated before them. Similarity also exists in the fact that the giving of false testimony before administrative bodies may be punished by the courts as perjury. The refusal to give evidence may also be held to constitute contempt, which, however, is not punished as such by the administrative agencies themselves, but by the courts to whom the refusal to testify is referred. However, such investigatory proceedings of administrative agencies are not judicial in the full sense of the word since they are not proceedings for the determination of contested rights between litigants who are to be bound by the decisions which are rendered. Thus, while constitutional questions have arisen as to the extent to which administrative agencies may constitutionally be empowered to inquire into the private interests of individuals, or, possibly, by compelling testimony, to cause a witness to incriminate himself, there has been no attempt to have the investigatory and fact-finding work of administrative agencies (so far as it serves as a basis for the issuance of ordinances or decrees) declared void as an unconstitutional delegation of judicial power.

When, however, administrative proceedings are had which are to lead to the issuance of decrees directed to individuals, and which directly affect their liberty of action or their property rights, the judicial field is approached much more nearly. Indeed, the courts have recognized, as they could not help doing, that, in many cases, these proceedings involve matters which it would be appropriate to submit for determination to themselves. And yet, and perhaps upon grounds of expediency, the courts have held that such proceedings may be had by administrative bodies, provided they, the courts, have the right to see that the requirements of due process of law have been satisfied, that the administrative agencies have not exceeded their statutory jurisdictions, and that, in other respects, their proceedings have been free from legal error.[1]

It thus appears that the delegation by Congress to executive or administrative agencies of functions of a judicial, or at least *quasi*-judicial character, provided the exercise of those functions is incidental to the exercise by such agencies of their executive or administrative powers, is not in violation of the principle of the Separation of Powers so far as that principle is recognized by the Federal Constitution, nor is it in violation of due process of law.

In Murray's Lessee v. Hoboken Land and Imp. Co.,[2] the court, after observing that Congress could not withdraw from judicial cognizance any matter which, from its very nature, is a subject of suit at common law, in equity, or in admiralty, nevertheless went on to say: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

It will be observed that the doctrine here declared is with reference only to matters involving "public rights." Thus a statute would undoubtedly be held unconstitutional which attempted to place in administrative hands the final determination of controversies between private individuals. However, as will later appear, especially in relation to employers' liability and workmen's compensation laws, the common-law rights and liabilities may be legislatively altered or even abolished provided there is substituted for them adequate administrative remedies or defences.[3] The effect of such substitution is, of course, to prevent judicial action with regard to whole classes of cases which, before such legislation, were justiciable in the courts, and to empower administrative agencies to give such relief or to impose such liabilities as are recognized and provided for the acts.

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[1] Louisville & Nashville R. Co. v. Garrett (231 U. S. 298).

[2] 18 How. 272.

[3] See Chapter LXXXIII.

§ 747. Judicial Control of Administrative Action.

The remainder of the present chapter will be devoted to an examination of the extent to which, and the means by which, the courts supervise or control the exercise by administrative agencies of their powers, and especially of their power to determine facts and, upon the basis of them, to issue orders or decrees. In this account no attempt will be made to treat comprehensively the means which the courts, through the employment of such writs as those of certiorari,[4] mandamus, injunction, quo warranto, habeas corpus, prohibition, etc., control the actions of executive or administrative officials, or, by ordinary actions in tort or otherwise, to visit upon such officials responsibility for illegal acts, done by them under color of official authority. To some extent these judicial processes have been incidentally discussed in connection with other subjects. A direct and comprehensive discussion of them would require a treatise in itself and would involve matters of ordinary as distinguished from constitutional law. Here, therefore, discussion will be confined to matters of special constitutional importance.

That the courts will issue mandamus to compel the performance of ministerial executive or administrative acts is, of course, a rule of law which is not peculiar to Federal constitutional jurisprudence. Its employment for this purpose needs, therefore, to be here considered only as regards the propriety of directing it to such high officials as the President or the heads of departments who stand in such close official relationship to him, and act to such an extent under his immediate direction, as to be his agents.

It may be noted, as a preface to this discussion, that mandamus is used by the courts as an aid to, as well as a restraint upon, the administrative branches of the Federal Government; that is, it is sometimes employed at the instance of administrative superiors to obtain obedience to their commands to their administrative subordinates.[5]

It may further be observed that no general authority to issue the writ of mandamus has been granted by Congress to the Federal courts. However, it has been held that the courts of the District of Columbia possess this power by reason of the general common-law powers which have been vested in them.[6]

The control exercised by the courts over administrative agencies by writs of injunction is, in general respects, controlled by the same considerations as those recognized with reference to writs of mandamus account of course being taken of the necessity that a basis for equitable relief shall be established.

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[4] Although the practice is otherwise in some of the States of the Union, the Federal practice is not to use certiorari in order to obtain judicial review of administrative action, even though that action be of a *quasi*-judicial character. Degge v. Hitchcock (229 U. S. 162).

[5] United States *ex rel.* Miller v. Black (128 U. S. 40).

[6] Kendall v. United States (12 Pet. 524).

The case which is usually cited as establishing once for all the doctrine that the Federal courts may compel by mandamus the performance by executive or administrative officials of purely ministerial acts, is that of Marbury v. Madison.[7] That case, however, is not of importance because establishing this principle which was already so well established as to need no reaffirmance, but because it declared the doctrine that the heads of the great departments of the Federal Government were within its application.[8]

The amenability of the President to compulsory judicial process has been earlier considered.[9] In that chapter is also considered the amenability to such process of heads of departments when acting for the President.

§ 748. Judicial Review of Administrative Determinations.

In general it may be said that complainants are not permitted to question the propriety of administrative action within the general sphere of the statutory authority of the administrative agency, unless the complainants have made use of all means available under the law to question before the administrative agencies the validity or propriety of the action. Thus, in United States v. Sing Tuck [10] the court declined to interfere by habeas corpus with the refusal by immigration officials of the right of entry into the United States to a person claiming to be an American citizen, prior to the determination of the propriety of that refusal by the highest administrative officer (the Secretary of Commerce and Labor) to whom the question could, under the law, have been referred.

In many cases it is provided by law that the administrative authorities must resort to the courts for an enforcement of the orders issued by them. In other cases it is provided that an appeal may lie to the courts from administrative determinations. When this is so, there is, of course, no question as to the power of the courts to review administrative determinations. But, where no provision is made for this review, and especially where the law expressly provides that the administrative determinations shall be conclusive in character, the right or propriety of the courts to review, and, if necessary, to revise those determinations is, in many cases, a matter of considerable doubt.

A general survey of the cases shows that the courts exercise a right to review administrative determinations upon the following grounds: (1) in order to ascertain whether the law under which the administrative agency is acting is constitutional; (2) in order to ascertain whether, by its procedure, or by the character of the action taken by it, the administrative body has violated any Federal constitutional provision, and especially that relating to due process of law; (3) granting that the law under which the administrative body is acting is valid, to ascertain whether the administrative body has properly construed the legislative mandate or principle or rule of regulation laid upon it; (4) in order to ascertain whether the administrative agency has acted in an *ultra vires* manner; (5) in order to ascertain whether the administrative agency has exercised its powers in an arbitrary, unreasonable, malicious, or unduly discriminatory or partial manner; and (6) in order to ascertain whether the administrative agency has made a correct finding of facts, or drawn conclusions from the facts found which those facts can, in reason, be conceived to support.

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[7] 1 Cr. 137.

[8] Even as to this point it has been argued that the opinion was *obiter* inasmuch as the court finally declared that it was without jurisdiction to entertain the suit as an original suit, in which form it had been brought.

[9] § 656.

[10] 194 U. S. 161.

It is clear, as has been earlier said in connection with the powers of the Interstate Commerce Commission,[11] that the courts act with propriety in reviewing administrative action in all of the above cases, and, indeed, that, constitutionally, they cannot be denied the power so to act except with regard to the correctness of the facts found by the administrative agencies, where, by law, such findings are declared to be conclusive in character; and, even when this is so declared by statute, the power of the courts exists to examine as to their correctness when these facts are such as relate to the jurisdiction of the administrative agency to act in the premises.

§ 749. Conclusiveness of Administrative Determinations.[12]

That due process of law, as constitutionally guaranteed, does not require that personal and property rights shall, in all cases, be distinguished from administrative tribunals, is established.[13]

There still remains, however, the right, and, indeed, the obligation, of the courts to prevent administrative tribunals from overstepping their several constitutional or statutory jurisdictions or of applying principles or rules which have not been legislatively sanctioned. But the inquiries thus necessitated require that questions of law and questions of fact be distinguished, and that jurisdictional facts be distinguished from other facts, and be treated by the courts upon a different basis. Inasmuch, however, as juristic logic or analysis has never been able to establish clear criteria of general applicability for making these distinctions, the courts have found themselves free, or, rather, obligated to treat each case upon its own merits and have been able to subsume such cases under only most general canons of judicial propriety. It being, then, impossible to bring all the cases involving the conclusions of administrative determinations into complete logical consistency, it will be necessary to consider them in classes so far as they can be classified.

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[11] See § 330.

[12] Upon this general subject see the excellent article by Professor T. R. Powell in the *American Political Science Review* for August, 1907, entitled "Conclusiveness of Administrative Determinations in the Federal Government."

[13] Murray's Lessee v. Hoboken Land and Improvement Co. (18 How. 272).

Professor John Dickinson in a recent and able work [14] has pointed out that, from what may be called considerations of expediency, the courts, with reference to certain classes of cases, have exercised their right to review administrative determinations with considerable strictness, while, in other classes of cases, they have exercised the right with much greater liberality. Thus, he has shown that where the complainant has sought some gratuity or benefit from the government, as, for example, the allotment of public lands, the courts have been disposed to hold themselves concluded by the determinations of administrative agencies even when those determinations have related to facts which have a jurisdictional significance.[15] A similar policy has been pursued with reference to "fraud orders" of the Postmaster General. Here the postal service has been deemed a necessary function of the government, and the opportunity of individuals to make use of it a privilege rather than a right. So also, in revenue cases, the interest of the government, being so vital in character, the courts have shown a reluctance to revise administrative determinations. In immigrations cases, the situation is not so clear. The liberty of an alien to enter the country can clearly be viewed as a privilege rather than as a right, but the right of a citizen of the United States to enter can hardly be so regarded, and yet the determination by immigration officials of the right of individuals to enter often turns upon the question whether they are or are not American citizens. Even here, however, as will be presently shown, the courts have ascribed a conclusiveness to administrative determinations, although the facts involved have been jurisdictional in character. With regard to interstate commerce the determinations of administrative officials have been more readily revised by the courts, especially in cases where large private property interests have been involved. However, even here, the tendency of the Supreme Court has been to accept as conclusive the findings of fact of the Interstate Commerce Commission if there has been any evidence to support such findings.[16]

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[14] *Administrative Justice and the Supremacy of Law in the United States* (Chapter III), Harvard University Press, 1927.

[15] See, for example, Riverside Oil Co. v. Hitchcock (190 U. S. 316).

[16] As to this see the discussion in Interstate Commerce Commission v. Union Pacific R. Co. (222 U. S. 541).

§ 750. Customs Appraisals and Classifications.

In a series of cases, the court has given to customs officers final and conclusive authority in the matter of appraisement and classification of imports.[17]

§ 751. Valuations.

In Ohio Valley Water Co. v. Ben Avon Borough [18] the State court held that, under a State statute the court had not been given the authority to substitute its judgment for that of the administrative agency as to what valuation should be placed upon the properties of public utilities. It also appeared that adequate opportunity had not been otherwise expressly provided, by injunction or other proceedings, for a public utility to test judicially the validity of determinations of the administrative agency which the public utility might deem to be confiscatory in character. In the absence of a ruling by the State court that such a judicial hearing might be had by injunction proceedings, said the Supreme Court, the State law would have to be held invalid as denying due process of law.

§ 752. Patents.

In Butterworth v. United States [19] was sustained the right of appeal to the courts from decisions of the Commissioner of Patents. The court reviewed the patent legislation of Congress and pointed out that property rights were involved, that the determination of claims for patents involved the adjudication of disputed questions of fact upon scientific or legal principles, the process being essentially judicial in character, and that the court, though interposed as an aid to the patent office, was not subject to it, its judgments being binding upon the parties, and conclusive upon the patent office itself.

§ 753. Land Patents.

In Smelting Co. v. Kemp [20] it was held that a patent for lands issued by the United States was conclusive of legal title in an action of law and could not be collaterally impeached in such action unless absolutely void on its face or issued without authority.

§ 754. Postal Fraud Orders.

In Public Clearing House v. Coyne [21] was sustained the constitutionality of a congressional delegation of authority to the Postmaster

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[17] Hilton v. Merritt (110 U. S. 97); Buttfield v. Stranahan (192 U. S. 470); Oceanic Steam Navigation Co. v. Stranahan (214 U. S. 320).

[18] 253 U. S. 287.

[19] 112 U. S. 50. See also United States v. Duell (172 U. S. 576).

[20] 104 U. S. 636.

[21] 194 U. S. 497.

General to determine, without the aid of the courts, whether the mail of a given concern should be execluded from the mails because fraudulent or partaking of the nature of a lottery.

Though the judgment of the Postmaster General, as granted him by statute, is held to be final and conclusive with reference to the issuance of fraud orders, the Supreme Court held, in American School of Magnetic Healing v. McAnnulty,[22] that the law requires that this judgment shall be one founded on facts ascertained by evidence, and that it may not be simply the Postmaster General's personal judgment as to the fraudulent character of the business whose mail is to be excluded. Thus, in this case, the Postmaster General having issued a fraud order against a corporation which assumed to heal disease through the influence of the mind, and to give advice and treatment by letter, the court declared the order not properly issued. The court said as to the claims of the complainants:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact. . . . We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. . . . That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case."

However, in Smith v. Hitchcock [23] the court held that, whether or not a publication was a book or a magazine within the terms of statutes of Congress, related to a matter of statutory construction with regard to which the court did not consider itself conclusively bound by the finding of the Postmaster General, and, therefore, itself made an examination and determination of the fact.[24]

§ 755. Immigration Exclusion Cases.

In the various Chinese exclusion cases the same principles as those already discussed have been applied. Inasmuch, however, as their application has involved questions of personal liberty rather than of property, their adoption by the courts has seemed to some oppressive, and in the Ju Toy case,[25] decided in 1905, earnest dissenting opinions were filed. In Chae Chan Ping v. United States [26] the court held valid the act of 1888 prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884 granting them permission to return. This the court did, even though it recognized that the act of 1888 was in contravention of express stipulations of the Treaties of 1868 and 1880 between the United States and China. In Fong Yue Ting v. United States[26a] the doctrine was again declared that the provisions of an act of Congress passed in the exercise of its constitutional authority must be upheld by the courts, even though in contravention of an earlier treaty. The power to exclude or expel aliens it held to be vested in the political departments of the government, and to be executed by the executive authority except so far as the judicial department has been authorized by treaty or statute to intervene, or where some provision of the Constitution has been violated. Having this right, the executive department, it was held, might be authorized to provide a system of registration and identification of Chinese laborers, and to require them to obtain certificates of residence, and to provide for the deportation of those not so obtaining certificates within a year. The provision of the act that the executive officer acting in behalf of the United States should bring the Chinese laborer before a Federal court in order that he might be heard and the facts upon which depended his right to remain in the country decided, was held valid, the duty thus imposed upon the court being declared judicial in character.

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[22] 187 U. S. 94, 104, 107.

[23] 226 U. S. 53.

[24] The Postmaster's finding was, however, approved. See also Houghton v. Payne (194 U. S. 88) and Smith v. Payne (194 U. S. 104).

[25] United States v. Ju Toy (198 U. S. 253).

[26] 130 U. S. 581.

In Nishimura Ekiu v. United States[27] it was held that in reaching the determination whether an alien is lawfully entitled to enter the country, it is not necessary for the administrator to take testimony. The court, however, said: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."

§ 756. Deportation of Aliens.

The cases which have been considered in the immediately preceding paragraph exhibit in the strongest manner the extent to which individual interests may constitutionally be subjected to conclusive administrative control. They do not weaken, however, the constitutional right and obligation of the courts to see that administrative proceedings must meet the requirements of due process of law, nor do they impair the right of the courts in all cases to inquire into the jurisdiction of the administrative agencies in the premises, and, in this inquiry, to examine, when they deem it proper to do so, into the correctness of the findings of the administrative agencies with reference to facts of a jurisdictional character. In Yamataya v. Fisher [28] the court said that it "must not be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

[26a] 149 U. S. 698.

[27] 142 U. S. 651. See also Lem Moon Sing v. United States (158 U. S. 538); United States v. Sing Tuck (194 U. S. 161); Chin Low v. United States (208 U. S. 8).

Where, from the nature of the case, the determination of the fact at issue, as, for example, the ascertainment of the character of a commodity, which character may be ascertained by comparing it with an established standard, it has been held that a hearing is not needed.[29] And in Ekiu v. United States,[30] earlier referred to, it was held that the statute [31] did not require inspectors to take testimony, but that they might decide upon their own inspection, whether an alien immigrant was entitled to enter the country. It was, however, declared that upon habeas corpus the question could be determined by the courts whether one prevented from landing had had an opportunity to ascertain whether his detention was lawful.

In Ng Fung Ho v. White [32] it was held that the mere fact that, at the time an alien entered the United States, he could not have been deported except by judicial proceedings, did not prevent his expulsion from the country by executive order under the General Immigration Act of February 5, 1917,[33] passed subsequently to his entry, there being no claim that he was a citizen of the United States. "Congress," said the court, "has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings." [34] And, later in the opinion: "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military service denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status.[35] . . . Where there is jurisdiction, a finding of fact by the executive department is conclusive;[36] and courts have no power to interfere unless there was either denial of a fair hearing; [37] or the finding was not supported by evidence,[38] or there was an application of an erroneous rule of law." [39]

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[28] 189 U. S. 86.

[29] Public Clearing House v. Coyne (194 U. S. 497).

[30] 142 U. S. 651.

[31] 26 Stat. at L. 1084.

[32] 259 U. S. 276, 280, 284.

[33] 39 Stat. at L. 874.

[34] Citing Bugajewitz v. Adams (228 U. S. 585); Lapina v. Williams (232 U. S. 78); and Lewis v. Frick (233 U. S. 291).

[35] Citing *Ex parte* Reed (100 U. S. 13); *Re* Grimley (137 U. S. 147); *Re* Morrissey (137 U. S. 157); Johnson v. Sayre (158 U. S. 109).

In United States v. Tod [40] the court, while conceding that the burden of proving alienage, and therefore jurisdiction to deport, rests upon the government, declared that deportation proceedings are civil in character,[41] that a person arrested on a preliminary warrant in such proceedings is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case, and that, in the instant case, the fact that the defendant had not testified in the hearing that he was a citizen or offered any evidence to that effect, had a tendency to prove that he was an alien sufficient to establish the jurisdiction of the administrative immigration agency to detain the defendant in custody pending proceedings for his deportation, and, therefore, to deprive him of a right to discharge on habeas corpus.

In United States v. Tod [42] it was held that knowledge by a defendant that printed matter distributed by him was of a seditious character, such as to justify his deportation was not a jurisdictional fact, such as is that of alienage, the determination of which by the administrative agency may be reviewed by the courts.

In Mahler v. Eby [43] it was held that absence in the warrant for deportation of a statement that an alien had been found by the administrative authority to be undesirable, and, therefore, under the act of Congress, subject to deportation, was fatal to the validity of the warrant.

In Tod v. Waldman, (*supra*) this doctrine was reaffirmed. However, the petitioners were not discharged, but were remanded to the custody of the immigration authorities to await a hearing on appeal to the Secretary of Labor, the right to which, until then, had not been accorded the petitioners. The mere implication from the order of deportation that the administrative agency had found facts justifying such order, said the court, was not sufficient. The facts, if found, needed to be stated and made a part of the record.

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[36] Citing United States v. Ju Toy (198 U. S. 253).

[37] Citing Chin Low v. United States (208 U. S. 8).

[38] Citing American School v. McAnnulty (187 U. S. 94).

[39] Citing Gegiow v. Uhl (239 U. S. 3).

[40] 263 U. S. 149.

[41] Citing Fong Yue Ting v. United States (149 U. S. 698); Bugajewitz v. Adams (228 U. S. 585).

[42] 264 U. S. 131.

[43] 264 U. S. 32. See also Tod v. Waldman (266 U. S. 113); Kwock Jan Fat v. White (253 U. S. 454); White v. Chin Fong (253 U. S. 90).

§ 757. Selective Draft Act of 1917.

In Angelus v. Sullivan [44] it was held that the finding of the Draft Board as to whether or not a conscripted person was an alien who had not declared his intention to become a citizen of the United States was conclusive, although this fact could, of course, have been regarded as a jurisdictional one so far as the Board was concerned.

§ 758. Interstate Commerce.

The attitude of the courts toward the determinations of the Interstate Commerce Commission has been dealt with in the chapter in which the work of this Commission has been discussed, and, therefore, little needs to be here added to this subject. The following quotation, from Interstate Commerce Commission v. Union Pacific R. Co.[45] rendered in 1912, may, however, be given since it sums up in brief form the whole position of the court as to its authority to examine into or revise the action of the Commission:

"In cases thus far decided," said the court, "it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." [46]

The court then went on to say: "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' [47] Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

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[44] 246 Fed. Rep. 54.

[45] 222 U. S. 541, 547.

[46] Citing Interstate Commerce Commission v. Illinois C. Ry. (215 U. S. 452); Southern Pacific R. Co. v. Interstate Commerce Com. (219 U. S. 433); Interstate Commerce Com. v. Northern Pac. R. Co. (216 U. S. 538); Interstate Commerce Com. v. Alabama Midland R. Co. (168 U. S. 144).

[47] Illinois C. R. Co. v. Interstate Commerce Com. (206 U. S. 441).

As an instance in which the court revised an order of the Commission because, in the court's opinion, based upon a wrong interpretation or application of the law may be cited the case of Interstate Commerce Commission v. Alabama Midland R. Co.[48] in which it was held that the Commission had not, as it should have, taken into consideration competition between rival routes as a circumstance statutorily required in determining whether the long and short haul clause of the law had been violated.[49] As an instance of a case in which the court set aside an order of the Commission, because having no reasonable foundation in the evidence, is that of Florida East Coast R. Co. v. United States.[50]

In Interstate Commerce Commission v. Brimson,[51] in which was contested the constitutionality of that section of the Interstate Commerce Act of 1887 which authorized and required the circuit courts of the United States to use their processes in aid of inquiries before the Commission, the general doctrines regarding the circumstances under which aid may be given by the courts to administrative agencies were considered at length.

§ 759. Federal Trade Commission.

The attitude of the courts towards the determinations of the Federal Trade Commission have been earlier considered.[52]

§ 760. Meat Inspection.

In Houston v. St. Louis Independent Packing Co.[53] the court said that it would not disturb the finding of the Secretary of Agriculture, fairly arrived at, and based upon substantial evidence, that the use of the term

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[48] 168 U. S. 144.

[49] For other cases of a similar character in which rulings of the Commission were held improper by the court, see United States v. B. & O. R. Co. (231 U. S. 274); and Southern Pac. R. Co. v. Interstate Commerce Com. (219 U. S. 433). For a review of other cases where the findings of fact by the Commission were examined by the court, see Dickinson, *Administrative Justice and the Supremacy of Law*, Chapter VI.

[50] 234 U. S. 167.

[51] 154 U. S. 447.

[52] See Chapter XLI, and especially the following cases: Federal Trade Commission v. Gratz (253 U. S. 421); Federal Trade Commission v. Beechnut Packing Co. (257 U. S. 441); Federal Trade Commission v. Sinclair Refining Co. (261 U. S. 463); and Federal Trade Commission v. Curtis Publishing Co. (260 U. S. 568).

[53] 249 U. S. 479.

"sausage" in connection with the manufacture and sale in international commerce of a product containing cereal in excess of two per cent was calculated to deceive purchasers and consumers.

§ 761. Extent of Administrative Discretion which May Be Constitutionally Delegated.

Generally speaking, it may be said that, while wide discretionary power may constitutionally be granted to administrative agents, that discretion must be one which must be guided by reason, justice and impartiality, and must be exercised in the execution of policies predetermined by legislative act, or fixed by the common law.

In Yick Wo v. Hopkins [54] the court laid down the doctrine that the legislative investment of purely personal and artbirary power in the hands of any public official is a denial of due process of law. "The very idea," said the court, "that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." [55] Of the ordinances in question the court said: "They seem intended to confer and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not as to places but as to persons. . . . The power given to them [the supervisors] is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance, nor restraint."

In fact, however, the court found in this case that the evidence showed that the ordinances in actual operation had been so exclusively directed against a particular class of persons "as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States." And the court added, "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

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[54] 118 U. S. 356.

[55] Quoting and approving City of Baltimore v. Radecke (49 Md. 217).

The judgment of the court was that the petitioners could not be punished for a violation of the ordinances in question.

Taken by itself the language of the court, as will be seen by the quotations which have been made, indicates a view that in no case may an arbitrary discretionary power be granted to a public official which will compel any person "to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another." The force of this holding is, however, somewhat weakened by the fact that, as has been seen, the court found that, whatever the terms or intent of the ordinances in question, they had actually been administered in a grossly partial and unjust manner. And also, and more important, in the later case of Wilson v. Eureka City [56] the court expressly upheld the constitutionality of an ordinance committing the right of the plaintiff with reference to the removal of a building owned by him, to the unrestrained discretion of a single official. The summary of cases in the State courts, given by the court in *Re* Flaherty,[57] in which unrestrained discretion is sustained, is quoted with approval, the court declaring the discretionary power to be "based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error." [58]

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[56] 173 U. S. 32, 36, 37.

[57] 105 Cal. 558.

[58] See also Davis v. Massachusetts (167 U. S. 43). The summary of cases given by the court in *Re* Flaherty is as follows:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (Pedrick v. Bailey, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (Commonwealth v. Abrahams, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (Commonwealth v. Davis, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (Vance v. Hadfield, 51 Hun. 620); giving the right to manufacturers to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (Sawyer v. Davis, 136 Mass. 239); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (Hine v. The City of New Haven, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (Vanderbilt v. Adams, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (Nightingale, Petitioner, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (Quincy v. Kennard, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (Commissioners, etc. v. Covey, 74 Md. 262); forbidding any person from remaining within the limits of the market more than

In this case it is certain that the Supreme Court committed itself to the doctrine that administrative officials may, in certain cases at least, be given a discretionary power to act according to their own unrestricted judgment as to what the circumstances require, and that, therefore, an ordinance or a law purporting to grant this authority is not, upon its face, void.

It may be predicted, however, that the grant of such arbitrary power will not be upheld except in those cases in which comparatively unimportant private interests are involved, or where the requirements of administrative efficiency demand the existence of such an authority. And, furthermore, the doctrine of Yick Wo v. Hopkins will of course apply in those cases where it is clearly shown that in fact the discretionary power which has been granted has been abused and oppressively or unfairly exercised.

In American School of Magnetic Healing v. McAnnulty [59] as has been seen, a fraud order of the Postmaster General was held not authorized by the statute under which the right to issue the order was claimed, the court holding that the law did not grant to the Postmaster General a power to issue fraud orders except in cases where there was evidence, that is, something more than the individual opinion of the Postmaster General, to show that the business against which the orders might be issued is a fraudulent one. The statutory power of Congress, should it see fit, to vest in the Postmaster General a general power to exclude from the use of the mails those concerns which in his judgment he might deem to be fraudulent was thus not involved or passed upon.

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twenty minutes unless permitted to do so by the superintendent or his deputy (Commonwealth v. Brooks, 109 Mass. 355)."

[59] 187 U. S. 94.

CHAPTER LXXVIII

DUE PROCESS OF LAW: THE DEVELOPMENT OF THE DOCTRINE

In almost every chapter of this treatise it has been necessary to refer to the constitutional requirement of due process of law, which, by the Fifth Amendment, is imposed upon the Federal Government, and, by the Fourteenth Amendment, imposed upon the States.[1] The specific and detailed discussion of this requirement has, however, been postponed to the present and immediately following chapters.

The cases in which the Supreme Court of the United States has found it necessary to examine the scope and application of this general limitation upon governmental power run into the hundreds, and, if those in the lower Federal and the State courts be regarded, they run into the thousands. No attempt will be made to examine all these cases, or even all of those decided in the Supreme Court, for, to do so, would be to usurp the place of a digest or of such an encyclopedic work as that of *Corpus Juris*.[2] The attempt will, however, be made to examine and discuss all those cases which have served to throw light upon the essential meaning of this fundamental feature of American constitutional jurisprudence, and to illustrate the various ways in which, substantively or procedurally, it has been applied. It is, therefore, believed that from the analysis and exposition which follows the reader can obtain a knowledge that will be reasonably adequate for a correct application of the doctrine to such juridical situations as have not been discussed or to such new situations as may, in the future, arise.

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[1] See especially Chapter XX for the discussion of Due Process of Law and the Regulation of Interstate Commerce.

[2] For general treatises on due process of law, see McGehee, *Due Process of Law* (1906) and Mott, *Due Process of Law* (1926).

The author desires to acknowledge his especial indebtedness, in dealing with this subject, to scholarly articles by Professors E. S. Corwin and T. R. Powell, among which may be noted: "The Basic Doctrine of American Constitutional Law" (12 *Mich. Law Rev.* 247), "The Doctrine of Due Process of Law before the Civil War" (24 *Harvard Law Rev.* 366, 460) and "The Supreme Court and the Fourteenth Amendment" (7 *Mich. Law Rev.* 643) by Professor Corwin; and "Judicial Review of Administrative Action in Immigration Proceedings" (22 *Harvard Law Rev.* 360), "Administrative Exercise of the Police Power" (24 *Harvard Law Rev.* 268, 333, 441), "The Constitutional Issue in Minimum Wage Legislation" (2 *Minn. Law Rev.* 1), "The Workmen's Compensation Cases" (32 *Political Science Quarterly*, 542), and "The Oregon Minimum Wage Cases" (32 *Political Science Quarterly*, 296), by Professor Powell.

§ 762. Has "Due Process" the Same Meaning in the Fifth Which It Has in the Fourteenth Amendment?

The meaning of the phrase "due process of law," as employed in the Fifth Amendment, would seem to have the same meaning as employed in the Fourteenth Amendment. However, in Wight v. Davidson[3] we find the court saying: "It by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling State legislation."

In a case decided at the same time as the foregoing case, namely, French v. Barber Asphalt Co.[4] the court, referring to the Fifth and Fourteenth Amendments, said: "It may be that questions may arise in which different constructions and applications of their provisions may be proper." It would appear, however, that no such contingency has as yet arisen. In Twining v. New Jersey,[5] the court said: "If any different meaning of the same words as they are used in the Fourteenth Amendment [and in the Fifth Amendment] can be conceived, none has as yet appeared in a judicial decision."

§ 763. Corporations Protected.

Corporations, equally with natural persons, are protected against deprivation of life, or property without due process of law.

The first statement by the Supreme Court that corporations are entitled as regards their property to the protection of the provision of the Fourteenth Amendment with regard to due process of law and the equal protection of the laws, was in Santa Clara Co. v. Southern Pac. R. Co.[6] in which the court said that it did not wish to hear argument upon question as all of the justices were of opinion that the protection applied.[7]

The life of a corporation, that is, its right to existence as a legal entity or person, is protected against arbitrary destruction.[8] It would seem, however, that its liberty, so far as it is not included under its right to life and property, is not protected by the due process of law provisions. At any rate we find the court saying in Northwestern National Life Ins. Co. v. Riggs:[9] "The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons." This case involved a State law somewhat restricting the liberty of the corporation to contract, which the court upheld as a legitimate police or governmental measure.

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[3] 181 U. S. 371.

[4] 181 U. S. 324.

[5] 211 U. S. 78.

[6] 118 U. S. 394.

[7] For reaffirmations see Covington & L. Turnpike Co. v. Sandford (164 U. S. 578); Smyth v. Ames (169 U. S. 466); Kentucky Finance Corporation v. Paramount Auto Exchange Corporation (262 U. S. 544).

[8] Monongahela Nav. Co. v. United States (148 U. S. 312). In this case it was held that corporate franchises could not be taken for a public purpose without just compensation.

Requiring, however, for their existence and their powers the positive act of the political power, there is opened up to the State a means by which a control may be exercised over them far beyond that which is constitutionally possible over the natural individual. This avenue of authority, of course, is through the reservation of regulative powers by the State at the time that the charters of incorporation are granted. Having the right to give or to withhold such charters the State may attach to their granting such conditions as it may see fit.

A State may not, however, as a condition precedent to a grant, obtain a control which trenches upon a matter reserved exclusively to Federal regulation as, for example, of interstate commerce; nor may it so exercise a reserved right of charter amendment as to work deprivation of property without due process of law. Subject to similar limitations, States, when admitting foreign corporations to do business within their borders, may condition that permission upon an agreement upon the part of the admitted corporations to forms of control which otherwise the State would not be competent to exert over private industries or employments. The right of the States to predicate admission to, or continuance to do business within their borders upon an agreement upon the part of corporations not to avail themselves of a Federal right, as, for example, to sue in the Federal courts, or, upon their forbearance in fact to exercise this right, is elsewhere considered.

§ 764. Aliens as Well as Citizens Are Entitled to Due Process of Law.

There is no question, as has appeared in the discussion of administrative proceedings for their exclusion or deportation, that aliens are entitled to the constitutional protection against deprivation of life, liberty or property without due process of law.[10] However, in the absence of congressional provision therefor, there may be some question as to the opportunity that an alien, prior to entrance into the United States, would have to assert this right in judicial proceedings. In fact, however, Congress has made provision for the testing by an alien of his right to enter the country. The decision as to this right may, indeed, be determined by administrative agencies, but the alien has a right to resort to the courts if there is claim upon his part that he has not had, procedurally speaking, due process of law, or that the administrative agency has, in other ways, exceeded or departed from its statutory authority. Except for this statutory provision, it would be possible to hold that acts of the government, alleged to be torts against aliens, outside the country should be treated as "Acts of State." In such cases the question of fact would arise whether an alien upon a ship entering an American harbor or territorial water, or even after landing on American soil, but prior to a recognition of his right to enter the country, would be deemed to be within the territorial jurisdiction of the United States so as to exclude the application of the doctrine of "Acts of State" even in its most restricted sense.

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[9] 203 U. S. 243.

[10] See § 764.

§ 765. Due Process and Other Specified Personal Rights.

The specific enumeration in the Fifth Amendment of other personal rights furnishes possible ground for arguing that such enumerated rights are not included within the general provision as to due process of law, but it is sufficiently established that this is not the case. In other words, the scope of due process of law is to be determined independently of the specific guarantee of other rights. Thus, in Chicago, etc., R. Co. v. Chicago,[11] due process of law was held to prevent the States from taking private property for a public use without just compensation, without regard to the fact that this is specifically forbidden in the Fifth Amendment.

§ 766. Due Process of Law May Be Waived.

A party who has freely consented to a process or jurisdiction cannot afterwards claim that he had been denied due process of law.[12]

§ 767. Development of the Doctrine of Due Process of Law.

The doctrine implied by the words "due process of law" has a history in Anglo-American law which extends for more than seven hundred years—back, indeed, to the signing of Magna Carta.[13] And yet, notwithstanding this long period during which countless opportunities have presented themselves for its application and judicial definition, the doctrine has not yet received a statement in such a form that its specific applications can, in all cases, be determined. This failure has been due, not to any lack of judicial effort or acumen, but to the very nature of the doctrine which, asserting a fundamental principle of justice rather than a specific rule of law, is not susceptible of more than general statement. The result is, that the meaning of the phrase has to be sought in the history of its specific applications, and, as the variety of these possible applications is infinite, it will probably never be possible to say that the full content of that meaning has been determined. In Twining v. New Jersey,[14] we find the court saying: "Few phrases of the law are so elusive of exact apprehension as this. . . . This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise." So also in Davidson v. New Orleans,[15] the court said: "to define what it is for a state to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law." And, later in the same opinion: "There is wisdom in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

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[11] 166 U. S. 226.

[12] Pierce Oil Corp. v. Phoenix Refining Co. (259 U. S. 125).

[13] See especially the articles by Professor Corwin referred to, *supra*, in note 2.

In Holden v. Hardy[16] the court said: "This court has never attempted to define with precision the words 'due process of law.' . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

It would appear, then, that a complete knowledge of the meaning of the doctrine of due process of law in American constitutional jurisprudence can be obtained only by a study of every case in which its application has been sought. However, true as this statement may be, it is possible for the commentator to escape, in a measure, from the necessity of describing these cases *seriatim* by grouping them under general topical heads. Also, in default of a possible definition which will be both comprehensive and of practical value in the determination of specific cases, it will be possible for the commentator to state certain more or less fundamental and therefore generally guiding principles which the courts have declared to be applicable in cases in which there is a claim that due process of law has not been accorded to one or another of the parties litigant. These more or less general or fundamental principles have revealed themselves for the most part, not in single cases, but as an evolutionary result from series of cases.

The foregoing observations sufficiently show that, to a peculiar extent, it is necessary that the history of the development of the doctrine of due process of law should be traced.

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[14] 211 U. S. 78.

[15] 96 U. S. 97.

[16] 169 U. S. 366, 389.

§ 768. Per Legem Terræ.

The historical antecedents of the phrase "due process of law" may be clearly traced back to the expression *per legem terræ* as it occurs in the Charter wrung by the Barons from King John. The 39th chapter of that document provides that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land" (*per legem terræ*). Space cannot be spared to trace, in English legal thought and practice, the history of this phrase. We must be content with the statement that the phrase came to be synonymous (as, for example, as used by Coke) with "by the law of the land," or "by due process of law"; and that it was in this sense, and as relating solely to matters of procedure, that the phrase "due process of law" was introduced into American law.[7]

§ 769. English and American Use of the Phrase "Due Process of Law" Contrasted.

The exact phrase "due process of law" was not employed in any of the eleven State constitutions adopted prior to the Federal Constitution, but it early found expression in substance, if not in very words, in those instruments. The very words do, however, appear in the Declaration of Rights of the State of New York, adopted in 1777, and in one of the amendments proposed by that State to the Federal Constitution as drafted by the Convention of 1787. The first appearance of the express provision in an American instrument of government is in the Fifth Article of Amendment to the Constitution of the United States, adopted in 1791. That Amendment provides, *inter alia*, that "nor shall any person . . . be deprived of life, liberty or property, without due process of law." The Federal imposition of this requirement upon the States did not come until 1868 when the Fourteenth Amendment was ratified.

It is a very remarkable fact that not until our written Constitution was more than half a century old did the phrase receive an interpretation and application which approximates that which it has to-day, and not, indeed, until a hundred years had passed away was resort had to it as the usual device of those disapproving of the acts of their legislatures. This, however, is no doubt in a measure explainable by the fact that not until the increased complexity of social and industrial life had led, upon the one hand, to the use by the State and Federal governments of administrative process more or less summary in character and, upon the other hand, to a marked increase in the regulative control of law over private acts and the use of public property, did there appear the necessity for

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[17] Murray's Lessee v. Hoboken Land etc. Co. (18 How. 272).

the appeal to this limitation by those who conceived themselves injured by the exercise of such administrative powers or by the enforcement of these legislative regulations.

In two most important respects the application in America of the requirement of due process of law has differed from that which it had received in England prior to 1776, and which, indeed, it still receives in that country. These are: (1) that, in the United States, it operates as a limitation upon the legislative as well as upon the executive branch of the government, and (2) that it relates to substantive as well as to procedural rights. This second application is, however, one which, as we shall see, was not at first developed.

Before the requirement could be recognized as one imposed upon the legislature there had first to be established the doctrine that the courts, when called upon to apply the enactments of the law-making branch of the government of which they themselves constitute the judiciary, may declare the invalidity of enactments which, in their judgment, conflict with the provisions of the written Constitution. This doctrine, as is well known, was not accepted without protest, but may be said to have received final and decisive sanction as a fundamental principle of American constitutional jurisprudence in the great opinion of Marshall, rendered in 1803, in the case of Marbury v. Madison.[18]

That, as contrasted with English practice, the requirement of due process of law was a limitation upon the legislative power, so far, at least, as to render void an enactment authorizing a taking of life, liberty or property by an arbitrary or otherwise defective procedure, seems early to have been held, the argument being founded upon the obvious fact that, as contrasted with the English constitutional documents, American written instruments of government and their accompanying Bills of Rights have for their primary aim the delimitation of the powers of all the departments of government—of the legislative as well as the executive and judicial.[19] In Hurtado v. California,[20] decided in 1884, the argument that the provisions of our Bills of Rights restrain the legislature is given in full—the distinction between English and American constitutional doctrines in this respect being emphasized.

§ 770. Early Reliance on Natural Rights or Inherent Limitations on Governments.

It does not appear to have been urged in these earlier cases that a law which provided a proper mode of procedure for its enforcement might be held void because in effect it operated, or might operate, to deprive the individual of a vested property right without due compensation made, or his life, liberty or property taken without justifiable excuse. By the Federal Constitution the States were forbidden to enact laws impairing the obligation of contracts, and this limitation was early held to apply to executed as well as to executory contracts, and to contracts to which the State was a party, as well as to contracts between private individuals;[21] and by the Dartmouth College case[22] charter grants were construed to be contracts upon the part of the State, the obligation of which might not be impaired by later legislation. By the Federal Constitution the States were further forbidden to enact *ex post facto* laws, but this restriction was early held in Calder v. Bull[23] to apply only to criminal laws. Thus, as far as limitations imposed by the Federal Constitution were concerned, all substantive private rights, except in so far as these might be founded upon contracts, were at the mercy of the State legislatures. The possibility, under a popular form of government, of oppression in the form of laws enacted by their own representatives, does not appear to have been keenly felt by the people. So far, however, as it was apprehended, the early view seems to have been that the restraints of natural law would be operative, according to the doctrine that the law-making branch of every government is inherently without the power arbitrarily and oppressively to invade the sphere of private rights of persons and property. This natural law doctrine, though it can never be said to have gained a definite establishment, even for a time, nevertheless received frequent *obiter* assertion, and its influence was for a long time seen in discussions of our higher courts.[24]

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[18] 1 Cr. 137.

[19] See Zylstra v. Corp. of Charleston (1 Bay. [S. C.] 382); cited by Corwin.

[20] 110 U. S. 516. See also Murray's Lessee v. Hoboken Land and Improvement Co. (18 How. 272).

§ 771. Development of the Doctrine That Due Process Includes Protection of Substantive as Well as of Procedural Rights.

Disregarding certain earlier cases which, to the discerning, might have indicated what was to be the course of development, but which can hardly be said to have established the doctrine, we come to a series of cases decided by the New York courts in the early fifties in which it was definitely stated that due process is a matter of substantive as well as of procedural right. Thus, in Westervelt v. Gregg[24a] decided in 1854, the court said of the measure under consideration: "such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass, is, in no sense the process of law designated by the Constitution." Finally, in the important case of Wynehamer v. New York [24b] decided in 1856, there was overturned an act of the State which forbade the sale of intoxicating liquors except for medicinal purposes, and which provided that, when not intended for such sale, these liquors should not be stored in any place but a dwelling house, and that, as nuisances, they might be seized and destroyed by summary process. The argument of the court was that intoxicating liquor is not a nuisance *per se*, and could not be made so by a simple legislative fiat, and, therefore, that liquors already in existence at the time of the enactment of the statute could not be seized and destroyed "even by the forms which belong to due process of law." Thus it was plainly declared that a statute might, by reason of its substantive provisions, deny due process of law, and without regard to matters of procedure.

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[21] Fletcher v. Peck (6 Cr. 87).

[22] Dartmouth College v. Woodward (4 Wh. 518).

[23] 3 Dall. 386.

[24] See, for example, Loan Assn. v. Topeka (20 Wall. 655), decided in 1875.

[24a] 12 N. Y. 202, 209.

Although there was thus stated in the Wynehamer case the doctrine which was ultimately to prevail in all of our courts, Federal and State, its general acceptance was not immediate, and it was not until 1869, in the first Legal Tender Case,[25] that we find for the first time the Federal Supreme Court stating definitely that the due process of law clause as it is found in the Fifth Amendment restrains the legislative power of Congress with reference to substantive as well as procedural rights. This declaration was, however, made in such a manner as to render it essentially *obiter* in character, and to make it plain that it is not the chief reliance of the court in holding void the law of Congress which was questioned in that case, for it was brought in only after the invalidity of that measure had already been declared upon other grounds, and was, in fact, not discussed until the clearly untenable argument had been advanced that the act was void as in violation of the "spirit of the Constitution."

In the Slaughter House Cases,[26] decided in 1873, the question of due process received only the briefest possible attention. Indeed, the court pointed out that the argument had not been pressed that the law under attack was void upon this ground, and declared: "It is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade of the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."

In Davidson v. New Orleans,[27] decided in 1878, the doctrine, though *obiter* in that case, may be said definitely to have been accepted by the Supreme Court that substantive rights of life, liberty and property are protected by the due process of law limitation against legislative deprivation. It is extremely interesting to study the mode of reasoning by which, in this case, this conclusion was reached. Shortly stated it was that a legislative act which arbitrarily controls the actions of the individual or the use by him of his property, and still more one which destroys his title to property and transfers it to another individual, amounts to a judgment against him, which judgment is, of course, one rendered in a proceeding which lacks the essentials of due process of law procedurally considered. And this reasoning, it must be admitted, still remains the only means by which the field of substantive rights may logically be brought under the operation of a limitation which, by its very words and historical application, is purely procedural in character.

[24b] 13 N. Y. 378.

[25] Hepburn v. Griswold (8 Wall. 603).

[26] 16 Wall. 36.

[27] 96 U. S. 97. *Cf.* C. B. & Q. R. Co. v. Chicago (166 U. S. 226), decided in 1897.

In 1877, the year before the decision of Davidson v. New Orleans, the court had been called upon to decide the case of Munn v. Illinois,[28] one of the so-called Granger Cases.

In this famous case was questioned the constitutionality of a certain law of the State of Illinois fixing maximum charges for the storage of grain that might be made by elevator companies at Chicago and other places in the State. The chief ground upon which this alleged unconstitutionality was rested was that the act operated as a deprivation of liberty and property without due process of law.

Without attempting to summarize the reasoning of the court in this case it may be said that, in effect, it was held that the due process of law requirement, interpreted in the light of inherent limitations upon legitimate legislative power in a free government, operated only to prevent an invasion, except by way of a legitimate exercise of the police power, of purely private rights, and that where a right was not purely private it became subject to public control by way of the regulation of charges that might be exacted by public employments or industries affected with a public interest, and that within this field of regulative control the discretionary authority of the legislature was practically without limit. Purely private rights were thus wholly exempted from control except by way of police regulation while those not thus wholly private were at the mercy of the legislative will. Due process of law was thus held to mark off a certain sphere of interests from legislative control, but not to operate as a restraint upon the legislative authority when exercised within the field of legislation reserved to it.

It was not very long, however, before the necessities of the cases, as revealed in various State statutes brought before it, led the Supreme Court to modify the broad statement made in the Munn case that in reviewing State statutes in regulation of public service corporations and industries affected with a public interest, as well as statutes passed in the exercise of the police power the sole question open to judicial determination is whether the acts in question lie within the field open to legislative control. In the Railroad Commission Cases (Stone v. Farmers' L. & T. Co.),[29] the court found it expedient to declare: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

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[28] 94 U. S. 113.

This modification of the doctrine of the Munn case, though it was not admitted by the court to be a modification, was, in truth, of great significance. It asserted a judicial power of restraint where none had before been claimed. To be sure this judicial restraining power was claimed only as to rates legislatively fixed so low as to be actually confiscatory in effect, that is, lower than the actual cost of rendering the services for which the rates were imposed; but only a few years later, in Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota [30] the court took the further step, logically involved in the doctrine of the Railroad Commission Cases, of asserting its authority to declare illegal, as a taking of property without due process of law, a rate which, though not so low as not to yield a net return of profit, is yet unreasonable in the sense that it will not yield to the company a due return upon its invested property.

§ 772. Reasonableness.

The doctrine thus declared has never since been disturbed and has been repeatedly affirmed, the only question giving rise to controversy being as to the criteria for determining reasonableness. There was at first a disposition to distinguish between those rates which were fixed directly by the legislature and those fixed by commissions acting under a general authority granted them by the legislature,[31] but this distinction, clearly without legal weight, was soon abandoned.[32]

In the Covington case the Supreme Court reversed the lower court (which had overruled a demurrer and granted a perpetual injunction restraining the company from exacting charges in excess of those established by a legislative act) and squarely asserted its authority to hold invalid, when unreasonably low, rates fixed by statute. Whether or not the rates involved were in fact invalid it was, of course, not necessary for the court then to determine.

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[29] 116 U. S. 307, 331.

[30] 134 U. S. 418.

[31] Budd v. New York (143 U. S. 517).

[32] Reagan v. Farmers' Loan & T. Co. (154 U. S. 362) (1894); Covington, etc., Co. v. Sandford (164 U. S. 578) (1896).

In Holden v. Hardy there was an explicit statement to this effect.[33]

In Adair v. United States [34] the provision of the law of Congress of June 1, 1898, making it a criminal offence for an agent of an interstate carrier to discharge an employee from service because of his membership in a labor union, was held as an unreasonable invasion of personal liberty.

In Smyth v. Ames, decided in 1898,[35] the court, for the first time, felt itself warranted in holding void because, in its judgment, unreasonably low, rates directly fixed by the legislature itself. In its opinion in this case the earlier discussions were carefully reviewed and the doctrine, as established by them, declared to be (p. 526): "A State enactment or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of his property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States"; and that "while rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, . . . cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

§ 773. Reasonableness and the Police Power.

This right of the courts to pass judgment upon the reasonableness of legislative regulations, as illustrated in their review of rates and other regulations established for the control of public service corporations and industries affected with a public interest, has likewise become well established with reference generally to enactments by legislatures in the exercise of their so-called police powers. Here, as in the case of the fixing of rates, the courts have reserved to themselves not only the authority to determine whether or not a measure sought to be justified as a police regulation may properly be upheld as such, but also, at times, the competency to determine whether the police regulation, granting it to be such, is a reasonable one, the end sought and the amount of interference with private rights entailed, being both considered. The leading decisions of the courts with reference to the police power will be considered in a later chapter. In Lochner v. New York [36] Justice Peckham said: "In every case that comes before this court, therefore, where legislation of this [police] character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?"

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[33] 169 U. S. 366.

[34] 208 U. S. 161.

[35] 169 U. S. 466, 526. As to the doctrine that the reasonableness of a statutory or administrative regulation is a matter for final determination by the courts, see Chicago M. & St. P. R. Co. v. Minnesota (134 U. S. 418). With regard to the distinction between unreasonable and confiscatory rates, see *ante*, § 517.

One important fact is to be noticed regarding this assumption by the courts of the authority to examine as to the reasonableness of the exercise by the legislatures of powers acknowledged to be possessed by them. This is that it necessarily brings the judgment of the court and that of the legislature into conflict upon mere matters of fact, and these, too, matters of fact which have guided the law-making branch in the exercise of its legislative discretion. Thus, in determining whether or not a legislatively determined railway rate, when put into effect, will yield a fair return to the carrier company, not only does the court have to answer this upon the basis of simple fact, but it has to determine what, under all the surrounding circumstances, are the criteria to be applied for determining reasonableness. It is true that the courts still assert that they have no concern with the wisdom, or policy, or abstract justice, of the statutory measure examined by them, nor with the motives of the lawmakers, but, in fact, as is clearly evident, there is opened the way to a court, when judging as to the reasonableness of a law, to substitute its judgment for that of the legislature as to the expediency of the measure, and it is because of this very substitution that the courts have been subjected to frequent criticism. This criticism, so far as it may justly be made, can be avoided by the courts only by a rigid adherence to the doctrine which, in principle, they accept as binding, that every possible doubt regarding the validity of a statute is to be resolved in its favor, and that, therefore, a law is to be held void only in case it is impossible for the court to find evidence sufficient to lead a rational person to believe in the reasonableness of the measure under examination. In the Lochner case [37] the court held that no sufficient evidence had been presented to show that the law under consideration would, if upheld and applied, have a beneficient influence, or any influence at all upon the health or the morals of the employees in bakeries, or would protect those employees against fraud, or in any direct sense advance the welfare and convenience of the public. In Adair v. United States [38] the court, as one of the grounds for holding void an act of Congress, declared that whether or not an employee upon an interstate railway is a member of a labor union is a fact that has no bearing upon the manner in which the railway is conducted and, therefore, that the law in question, which forbade such employees to be refused employment, or discharged from employment because of membership in a union, was not a regulation of interstate commerce and, therefore, not a law supported by the commercial power of Congress.

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[36] 198 U. S. 45, 56.

[37] See 198 U. S. 45.

To the author it seems that, in the Adair case, the court hardly gave to the law in question that benefit of doubt which it deserved as to the possible relationship in fact between the regulation it sought to impose and the efficiency and safety of interstate railway transportation. In Laurel Hill Cemetery v. San Francisco [39] the court, in the author's opinion, stated a more satisfactory doctrine when, with regard to the constitutionality of a municipal ordinance forbidding the burial of the dead within the city limits, it said: "If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. . . . The extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. . . . The plaintiff must wait until there is a change of practice, or at least an established consensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold."

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[38] 208 U. S. 161.

[39] 216 U. S. 358, 365, 366.

CHAPTER LXXIX

DUE PROCESS OF LAW AND JUDICIAL PROCEDURE

In this chapter will be considered due process of law upon its purely procedural side.

It has already been shown that it is only upon its procedural side that the requirement of due process has been of significance in English constitutional and political history: and it is a fact which deserves comment that practically all the attempts from the time of Magna Carta to the present day which Englishmen have made to oppose their individual rights to governmental control, have taken the form, not so much of substantive limitations upon legislative control or of the control of the government in general, as of statements of the manner in which, that is, the procedure by which, the rights of life, liberty and property of the individual may be subjected to political control.

It is quite proper, then, in our attempt to determine the procedural requirements in the United States of the constitutional provision as to due process of law, to resort at times to the meaning which this phrase had historically come to have in the country from which we received it. Thus, as the Supreme Court has said, the specific content of the phrase is largely to be ascertained by "an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." [1]

§ 774. Due Procedure Not Immutable.

But this historical method of determining the meaning of the phrase is not to be exclusively resorted to, or, when resorted to, the court concluded thereby. That is to say, the fact that a given procedure is not to be found accepted in English and prior American practice is not to be held as conclusively determining it not to be due process of law. If the procedure under examination can be shown to preserve the fundamental characteristics and to provide the necessary protection to the individual, which the Constitution was intended to secure, its novelty will not vitiate it. Thus in Hurtado v. California,[2] in which substitution by the

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[1] Twining v. New Jersey (211 U. S. 78).

[2] 110 U. S. 516.

State of prosecution by information in lieu of indictment was recognized as valid, the court declared that a true philosophy of American personal liberty and individual right permits "a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give from time to time new expression and greater effect to modern ideas of self-government;" and that "this flexibility and capacity for growth and adaption is the peculiar boast and excellence of the common law." "It follows," the argument concluded, "that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." And in Twining v. New Jersey [3] the court declared that to adopt the principle that a procedure established in English law at the time of the emigration and brought to this country and practiced here by our ancestors is necessarily an element in due process of law would be to fasten the procedure of the first half of the seventeenth century upon American jurisprudence like a straight jacket which could only be unloosened by constitutional amendment. It would be, as declared by Justice Matthews in Hurtado v. California, "to deny every quality of the law but its age, and to render it incapable of progress or improvement." [4]

As has been already pointed out, it is not possible to give a precise and comprehensive definition of due process of law. However in Twining v. New Jersey [5] in which this was declared, the court went on to say: "There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of *Magna Charta* which provides that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land.' " [6]

In Hagar v. Reclamation Dist.[7] it was said: "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause in question, means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

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[3] 211 U. S. 78.

[4] See also Holden v. Hardy (169 U. S. 366).

[5] 211 U. S. 78, 100.

[6] Citing Murray's Lessee v. Hoboken Land & Imp. Co. (18 How. 272); Davidson v. New Orleans (96 U. S. 97); Jones v. Robbins (8 Gray, 329); Cooley, *Const. Lim.*, 7th ed., 500; McGehee, *Due Process of Law*, 16.

[7] 111 U. S. 701.

"By the law of the land," said Webster in a much quoted paragraph, "is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." [8]

In Missouri Pacific Ry. v. Humes [9] the court, with reference to the limitations laid by the due process clause of the Fourteenth Amendment upon the States, said: "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

§ 775. Opportunity for a Hearing.

In other sections of the present work the force of the due process of law requirement with reference to notice and hearing in administrative proceedings is considered. The present section will have regard to this requirement with reference only to proceedings before or in the courts.

From the general characterizations of due process which have been already quoted, it will have been seen that an essential element of due process of law is that the parties whose personal or property rights may be affected by any judgment, verdict, or decree that may be rendered or given by a court shall have had "his day in court." This means: (1) that he shall have had due notice, which may be actual or constructive, of the institution of the proceedings by which his legal rights may be affected; (2) that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence; (3) that the tribunal in or before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality; and (4) that it is a court of competent jurisdiction.

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[8] Dartmouth College v. Woodward (4 Wh. 518, 581).

[9] 115 U. S. 512.

§ 776. Jurisdiction Essential to Due Process of Law: Service of Process outside the State.

There has never been any question that due process of law is denied when rights of person or property are attempted to be regulated by courts or other governmental agencies which have not jurisdiction of the parties or of the subject-matter or of both. It is also established, as elsewhere discussed, that a State of the Union can exercise no jurisdiction outside its territorial limits.[10]

It is a general jurisdictional doctrine, which will be later discussed that service of process upon a defendant within the jurisdiction of a State is required by due process of law in order that a judgment *in personam* may be rendered.[11] However, it would seem that, in the case of residents of the State, this service may be merely a constructive one, namely, by mail or publication, or by substitution, or by leaving notice at the last known address of the person to be served. As regards this constructive service it would seem that due process requires only that such reasonable effort be made as is possible to have the notice brought to the attention of the one to be served. Constructive service, whether upon residents or non-residents is sufficient to support a judgment *in rem.* Whether or not a constructive service on residents will support a judgment *in personam* which will be valid not only within the State in which rendered, but also entitled to recognition in other States under the Full Faith and Credit Clause of the Federal Constitution, is not so clear. That a personal judgment rendered in a State court against a non-resident of the State, without personal service upon him within the State or his appearance in the action upon service by publication is without validity even in the State in which rendered has been usually regarded as having been decided in Pennoyer v. Neff.[12] However, it is not clear that that case is authority for more than the proposition that such judgments need not be recognized by the courts of the other States or by the Federal courts; and the fact is that such judgments are rendered and held binding by the courts of some States, although in other States they are held to be wholly invalid as denials of due process of law.[13]

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[10] "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by the court, an illegitimate assumption of power, and be resisted as a mere abuse." Pennoyer v. Neff (95 U. S. 714). Citing D'Arcy v. Ketchum (11 How. 165).

It would appear that the court held this principle to be one deducible from the very nature of political authority, that is, one that would exist independently of any constitutional provision, and, indeed, the fact is that the State judgment in this case, the validity of which was in question, had been rendered prior to the adoption of the Fourteenth Amendment, and, therefore, prior to the time when the States were prohibited by Federal constitutional provision from denying due process of law.

[11] As to the effect of a false return of service, see Miedrich v. Lauenstein (232 U. S. 236). See also note in 28 *Yale Law Journal*, 579.

[12] 95 U. S. 714.

§ 777. Impartial Tribunal.

As regards the requirement of impartiality and honesty of the court it may be said that this may be questioned only when there is evidence of actual fraud, or if, from its very constitution or personnel, the judges would appear, either to lack honesty, or to be personally interested in the outcome of the causes litigated before them to an extent that will tend to impair their impartiality.

This latter consideration was involved in Tumey v. Ohio [14] in which it was held that an accused was denied due process of law when subjected to a trial before a judge who, under the law, received twelve dollars as costs for convictions for violations of the liquor law, and whose receipts from this source amounted to about one hundred dollars a month. The court, after citing cases establishing the general rule that officers acting in a judicial or *quasi*-judicial capacity are disqualified to sit in controversies in the outcome of which they are interested, said that nice questions, however, often arise as to the degree or nature of the interest to be deemed disqualifying, and that, under some circumstances, there are no judges available who are not to some degree personally interested in cases to be adjudicated. Matters of kinship, personal bias, State policies, remoteness of interest, said the court, would seem to be left to legislative discretion as to whether they should be deemed to be disqualifying factors.[14a]

The court, furthermore, found that due process of law had been denied by reason of the general scheme adopted by the State which was one to stimulate by financial inducements its small local authorities to secure convictions under the prohibition law.

§ 778. Fraud.

When fraud is shown to have been present in a judicial proceeding, due process of law is of course denied.[15]

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[13] For extended discussion of constructive service in its relation to due process of law, see the notes in 50 L. R. A. 585, and 35 L. R. A. (new series) 292. See also McDonald v. Mabee (243 U. S. 90) and Coler v. Corn Exchange Bank (250 N. Y. 136, 145) in which this case is cited.

[14] 273 U. S. 510.

[14a] In Evans v. Gore (253 U. S. 245) the Supreme Court was called upon to consider the power of Congress to tax the salaries of its own Justices (including those of other Federal Judges). As to jurisdiction in the premises, see the Courts' comment on p. 247.

[15] Hall, in a note to his *Cases on Constitutional Law* (1st ed., p. 293) refers to the following cases containing *dicta* to this effect. Chicago, M. & St. P. R. Co. v. Min-

§ 779. Court Must Be Free from Outside Duress.

In Frank v. Mangum [16] it was conceded that due process of law is denied to a person tried and convicted by a court overawed and dominated by threats of mob violence or by other forms of outside duress.[17] However, in this case, the Supreme Court held that it was not justified in releasing the plaintiff in error from State custody upon such ground when it appeared that he had made the same allegations before the highest appellate court of the State, which court was not alleged to have been itself subjected to threats or other outside duress, and which court had decided that the trial court had not, in fact, been overawed to the prejudice of the accused. This finding of fact by the State's highest court, the Supreme Court held, upon grounds of comity, should not be reviewed by itself.

It is clear that, in this case, the Supreme Court gave an almost conclusive character to the decision of the appellate court of the State that the facts did not show that the trial court had been so overawed by threats of mob violence as to prevent a trial that could properly be spoken of as providing due process of law. The Federal Supreme Court had the power, if it had desired to exercise it, to ask that the entire record of the proceedings in the trial court be supplied to it, and then to make an examination of the facts as thus presented in order to arrive at a judgment of its own as to whether in fact, the petitioner had had a trial that would satisfy the requirements of due process of law. It is the author's opinion that this should have been done—that the petitioner was constitutionally entitled to have such a review when the point at issue was as to the very validity of the proceedings in the trial court as tested by Federal constitutional requirements.[18]

In Moore v. Dempsey [19] the court was presented with much the same

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nesota (134 U. S. 418); Louisville & N. R. Co. v. Kentucky (183 U. S. 503); C., B. & Q. R. Co. v. Babcock (204 U. S. 585); Ross v. Stewart (227 U. S. 530).

[16] 237 U. S. 309, 335, 347.

[17] The court said: "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

[18] Justices Holmes and Hughes, in their dissenting opinion, said: "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. . . . Otherwise the right will be a barren one." Citing Kansas City Southern R. Co. v. C. H. Albers Commission Co. (223 U. S. 573); and Norfolk and Western R. Co. v. Conley (236 U. S. 605).

[19] 261 U. S. 86.

situation and claim as had been presented in Frank v. Mangum, and, without expressly overruling the doctrine of that case, arrived at substantially the conclusion urged upon the court by the dissenting justices in the Frank case.

Although it is not easy to harmonize the actions of the court in the two cases last referred to, one thing would seem to be certain, and that is that the Supreme Court will not consider itself concluded by determinations of fact by the highest appellate courts of a State, whether upon grounds of comity or other grounds, when there is an allegation, supported by evidence of a prima facie character, that the appellate courts themselves have been either dominated or unduly swayed by threats of mob violence or by any other forms of outside pressure which can be said to amount to duress.

§ 780. Fixed Interpretation of Laws by the Courts Not Guaranteed.

It has been held that due process of law does not protect the individual who, in obedience to an interpretation given by executive officers to a statute, takes action which is later held by the courts to be unwarranted by that statute. Thus, with reference to a State tax law the court in Thompson v. Kentucky [20] declared: "Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a State as against their interpretation by the courts of the State, or relief from the consequences of a misinterpretation by either. . . . It is the province of the courts to interpret the laws of the State, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security." [21]

§ 781. Erroneous Determination of Facts or of Law by Courts.

It is established that the guaranty to suitors of due process of law does not furnish to them a right to have decisions of courts reviewed upon the mere ground that such decisions have been based upon erroneous findings of fact or upon erroneous determinations of law. Such errors, if committed by trial courts, can be corrected only by ordinary appellate proceedings as provided for by law. Especially has this doctrine been declared in cases in which the Federal courts have been asked to review the decisions of State courts. In Sauer v. New York [22] the court said: "We are not concerned primarily with the correctness of the rule adopted by the Court of Appeals of New York and its conformity with authority.

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[20] 209 U. S. 340, 346.

[21] See also Patterson v. Colorado (205 U. S. 454).

[22] 206 U. S. 536, 545. See also, McGovern v. New York (229 U. S. 363), and American Ry. Express Co. v. Kentucky (273 U. S. 269).

This court does not hold the relation to the controversy between these parties which the Court of Appeals of New York had. It was the duty of that court to ascertain, declare, and apply the law of New York, and its determination of that law is conclusive upon this court."

It scarcely needs be said that the Federal courts do not hold themselves bound by decisions of the State courts as to whether or not, in specific cases, due process of law has been denied by judicial, legislative or administrative State action. The immunity from such deprivation being a distinctively Federal right, the Federal courts will exercise their own independent judgment as to whether the right has been violated.[23]

§ 782. Rules of Evidence and Procedure May Be Changed.

It has been held that, so long as the fundamental rights of litigants to a fair trial, as regards notice, opportunity to present evidence, etc., and adequate relief are provided, and specific requirements of the Constitution are not violated, Congress has a full discretion as to the form of the trial or adjudication, and the character of the remedy to be furnished. Thus, the States not being bound by the Fifth, Sixth and Seventh Amendments, grand and petit juries may be dispensed with by them.[24] So also, within limits, legislatures may determine what evidence shall be received, and the effect of that evidence, so long as the fundamental rights of the parties are preserved.[25]

No person has a vested right to a particular remedy. "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." [26] Statutes of limitations, if reasonable, are not unconstitutional as denial of property or contractural rights. The authorities as to this are so numerous as not to need citation.

§ 783. Presumptions.

It is established that, without denying due process of law, certain facts or circumstances may be declared by statute to have a presumptive probative value, provided there is a reasonable logical relation between them and the facts they are declared to evidence.[27]

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[23] Scott v. McNeal (154 U. S. 34). See also Chicago B. & Q. R. Co. v. Chicago (166 U. S. 226); Muhlker v. N. Y. & Harlem R. Co. (197 U. S. 544).

[24] Hurtado v. California (110 U. S. 516); Maxwell v. Dow (176 U. S. 581).

[25] See Fong Yue Ting v. United States (149 U. S. 698), and authorities there cited. In Adams v. New York (192 U. S. 585), it was held that due process of law was not denied by a State law making possession of policy slips prima facie evidence of "possession thereof knowingly," and as such a crime.

[26] Brown v. New Jersey (175 U. S. 172).

§ 784. Common-Law Remedies and Defences: Abrogation of.

Consistently with due process of law a State may provide by statute that the common-law doctrine of contributory negligence, and assumption of risk, and the fellow-servant doctrine shall not be applied so as to bar a recovery of damages for accidents to employees in hazardous occupations; and also that, in such causes, the burden of proof shall be upon the defendant to show that he has complied with all the requirements of law with regard to the safeguarding of dangerous machinery.[28]

§ 785. State Systems of Judicial Administration Not Required to Be Ideal.

The Federal requirement upon the State to furnish due process in the administration of its law does not obligate the States to provide a system of judicial administration that is ideal either in its organization or operation. It is sufficient if that system meets the fundamental conditions of justice and fairness.[29]

§ 786. Due Process and Common-Law Rights.

No one has a vested property interest in any rule of law, substantive or procedural; whence it follows that a law which creates a liability where none has previously existed, or removes or modifies a liability which has previously existed, cannot be considered in itself, *per se*, as a taking or abridgment of the liberty or property of the individual. And the same is true, as has been seen, with reference to changes in procedural rights, provided, of course, some satisfactory procedure is provided.

That a legislature should have this power to modify existing law is, of course, imperative in any but an absolutely stationary social and industrial society. As Justice Matthews said, in Hurtado v. California,[30] in which case was upheld a State law which substituted by information for indictment by a grand jury in the prosecution for crimes, "The flexibility or capacity for growth and adaption is the peculiar boast of excellence of the common law."

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[27] Mobile J. & K. C. R. Co. v. Turnipseed (219 U. S. 35). *Cf.* Hovey v. Elliott (167 U. S. 409); Hammond Packing Co. v. Arkansas (212 U. S. 322); Western & Atlantic R. v. Henderson (279 U. S. 639).

[28] See Bowersock v. Smith (243 U. S. 29), and authorities therein cited. See also Chicago, R. I. & P. R. Co. v. Cole (251 U. S. 54). *Cf.* Castillo v. McConnico (168 U. S. 674).

[29] Ownbey v. Morgan (256 U. S. 94).

[30] 110 U. S. 530.

The general doctrine then is that so long as existing vested property rights are not disturbed, the substantive law, whether of common law or of statutory creation, is subject to change. That is, a change in the substantive law is not *per se* a deprivation of the rights of life, liberty and property of the individuals affected by it.

In Munn v. Illinois [31] the court said: "A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

§ 787. Arraignment.

In Garland v. State of Washington [32] the court refused to hold a conviction wanting in due process of law because the record showed that there had been no arraignment under, or plea to a second and amended information; it appearing that the accused had had a jury trial with full opportunity to be heard, in this respect overruling the earlier case of Crain v. United States.[33] The court in its opinion pointed out that technical objections, such as the one made in the instant case, were not given the weight which was formerly given to them, and said: "With improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away."

§ 788. Jury Trial.

Indictment by a grand jury is not an essential of due process of law in criminal proceedings,[34] nor is trial by a jury.[35]

§ 789. Self-Incrimination.

In Twining v. New Jersey,[36] the court, after an historical survey of the provision against self-incrimination, said: "We think it is manifest from this review of the origin, growth, extent, and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Charta or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision." While recognizing this historical argument as of great weight, the court, nevertheless, went on to rest its decision upon the broader ground, that, in its essential nature, the right is not one which necessarily inheres in the idea of due process. As to this the court said: "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property."

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[31] 94 U. S. 113. See also, Martin v. Pittsburgh etc., Ry. Co. (203 U. S. 284).

[32] 232 U. S. 642.

[33] 162 U. S. 625.

[34] Hurtado v. California (110 U. S. 516).

[35] Walker v. Sauvinet (92 U. S. 90); Maxwell v. Dow (176 U. S. 581).

[36] 211 U. S. 78, 105, 113.

§ 790. Presence of Accused When Verdict Is Rendered May Be Waived.

In Frank v. Mangum [37] it was held that the requirement of due process is not violated by the absence of the accused when the verdict is rendered, if his presence has been waived by his counsel. Even when this waiver has been without his consent or knowledge, where the accused has failed to set this up in his motion for a new trial, after being fully aware of the waiver, and that motion has been heard both by the trial and the Supreme Court of the State, he cannot, after this motion has been adjudicated against him, move to set aside the verdict as a nullity because of his absence.[38]

§ 791. Confronting Witnesses.

There is no case specifically holding that the opportunity to confront witnesses in criminal proceedings is a requirement of due process of law. In West v. Louisiana [39] it was held that such due process was not denied by the admission as evidence of the deposition of a witness, not present at the trial, which had been given at a preliminary examination at which the accused was present and given the opportunity to cross-examine.

That opportunity to confront witnesses in criminal cases in the Federal courts shall be given the accused, is specifically provided by the Sixth Amendment.

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[37] 237 U. S. 309.

[38] See generally this case for a discussion of the extent to which the States, without denying due process of law, may modify common-law requirements with respect to jury trials.

[39] 194 U. S. 258.

§ 792. Appeal Not Essential to Due Process.

Due process of law does not require the provision of a right of appeal from a trial to a superior court. In McKane v. Durston [40] the court declared that "a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now a necessary element of due process of law." [41] In Pittsburgh, etc., R. Co. v. Backus,[42] with reference to a right of appeal in a matter of tax assessment, the court said: "If a single hearing is not due process, doubling it will not make it so."

§ 793. Due Process and Contempt Proceedings.

When a contempt has been committed in open court the court may, upon its own knowledge of the facts, without further proof, and without issue or trial or hearing of an explanation of the motives of the offender, immediately determine whether a punishment is justified and what that punishment shall be.[43] When, however, the contempt is not committed in open court, due process of law requires that the accused shall be advised of the charges, and be given a reasonable opportunity to meet them either by way of explanation or of defence.[44]

§ 794. Crimes Must Be Clearly Defined.

Due process of law requires that one shall not be held criminally responsible under statutes by which offences are so indefinitely defined or described as not to enable one to determine whether or not he is committing them. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." [45]

In the footnote just given cases are referred to in which the provision

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[40] 153 U. S. 684.

[41] This is quoted with approval in Reetz v. Michigan (188 U. S. 505); also in Andrews v. Swartz (156 U. S. 272); Fallbrook v. Bradley (164 U. S. 112).

[42] 154 U. S. 421.

[43] *Ex parte* Terry (128 U. S. 289).

[44] Cooke v. United States (267 U. S. 517).

[45] Connally v. General Construction Co. (269 U. S. 385). Citing International Harvester Co. v. Kentucky (234 U. S. 216); Collins v. Kentucky (234 U. S. 634). In the Connally case was held void, because of uncertainty, a State statute which provided an eight hour day for persons employed by or on behalf of the State and that they should be paid "not less than the current rate of per diem wages in the locality."

In United States v. Cohen Grocery Co. (255 U. S. 81), Section 4 of the Food Control Act of 1917 of Congress, was held similarly void which imposed a penalty upon any person who should make "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

In United States v. Capitol Traction Co. (34 App. D. C. 592), a statute was held of the Federal Anti-Trust Act of 1890 with reference to contracts or combinations in restraint of competition or the obstruction of interstate trade was upheld as not to vague for enforcement. In Cline v. Frink Dairy Co.[46] the whole subject of statutory uncertainity in its relation to due process of law was again reviewed, and it was pointed out that the principle has application to civil as well as to criminal legislation.

§ 795. Excessive Penalties and Due Process of Law.

There is a line of cases which hold that due process of law is denied when such excessive penalties are attached to the violation of statutory or administrative orders as to make it practically impossible for the individual to test their validity by violating them. Thus, in Missouri Pacific R. Co. v. Tucker [47] the imposition by a State law of a liability of $500 as liquidated damages, together with an attorney's fee, for every charge by a common carrier in excess of that fixed by law, was declared a denial of due process of law. "It will be perceived," said the court, "that this liability is not proportioned to the actual damages. . . . Nor is it as if there would be difficulty in proving or ascertaining the actual damages."

Ex parte Young,[48] which falls within this line of cases, has been elsewhere discussed.[49]

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void which made it an offence for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding."

In Fox v. State of Washington (236 U. S. 273), however, a State statute was held not to offend the principle of certainty which declared criminal the editing of printed matter tending to encourage and advocate disrepect for law. This decision, however, was reached, as the court said, in the light of applications of the statute made by the State court which indicated that the statute would be confined to the printed matter encouraging an actual breach of law. "Therefore," said the court, "the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail."

In Nash v. United States (229 U. S. 373), it was held that the provision of the Anti-Trust Act of 1890 with regard to contracts and combinations which unduly restrict competition or obstruct the course of trade was not so vague as to render it inoperative as a criminal measure, because it had been held that this provision applied only to such contracts or combinations as, by reason of intent or by their inherent nature, unduly restricted competition or unduly obstructed the course of trade.

Similarly, in Seven Cases v. United States (239 U. S. 510), was sustained as not too vague, the provision of the Food and Drugs Act of June 30, 1906 (34 Stat. at L. 768) which declares contraband of interstate trade drugs which bear or contain in or upon packages or labels any fraudulent statements as to their curative or therapeutic value.

[46] 274 U. S. 445.

[47] 230 U. S. 340.

[48] 209 U. S. 123.

[49] See also Lawrence v. St. Louis S. F. R. Co. (278 U. S. 228); and St. Louis, etc., R. Co. v. Pub. Service Com. (279 U. S. 560).

In Chicago, Milwaukee & St. P. R. Co. v. Polt,[50] the exaction of a double penalty from a railway company failing to pay within sixty days claims for damages caused by fires set by a locomotive was held to deny due process of law. "The rudiments of fair play required by the Fourteenth Amendment," said the court, "are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by St. Louis, I. M. & S. R. Co. v. Wynne.[51] It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just." [52]

However, in Kansas City Southern R. Co. v. Anderson [53] a State law was upheld which provided for a double liability, and attorney's fees from railway companies which refused to pay for live stock killed by their trains within thirty days after the owner's demand, where the justice of the demand was fully established in suits following the refusal to pay. In this case the State courts had construed the act not to apply to cases where the original demands had been greater than that recovered upon trial.[54]

In Southwestern Tel. & Tel. Co. v. Danaher [55] the imposition upon the company of penalties aggregating $6,300 because of its impartial enforcement against one of its patrons of a regulation that it would not furnish service to any patrons in arrears for past services, was a taking of the property of the company without due process of law.

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[50] 232 U. S. 165, 168.

[51] 224 U. S. 354.

[52] Citing Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. (226 U. S. 217).

[53] 233 U. S. 325.

[54] *Cf.* Missouri, K. & T. R. Co. v. Cade (233 U. S. 642); Missouri, K. & T. R. Co. v. Harris (234 U. S. 412); St. Louis I. M. & S. R. Co. v. Williams (251 U. S. 63).

[55] 238 U. S. 482.

CHAPTER LXXX

DUE PROCESS OF LAW AND ADMINISTRATIVE PROCEEDINGS

It has been earlier pointed out that due process of law does not require that personal and property rights shall, in all cases, be finally determined in courts of law as distinguished from administrative tribunals.[1] "Due process of law," means, then, not so much that a specific mode of procedure shall be followed, as that, in that procedure, certain fundamental principles looking to the protection of the individual against oppression and injustice shall be followed.

An administrative officer or board when acting in what is substantially a judicial capacity is not bound by the procedural requirements of a court of justice as regards evidence, pleading, etc. It may receive hearsay evidence and uncertified documents, dispense with the technical proof of their execution, etc. And, furthermore, it is not necessarily bound by the doctrine of *stare decisis,* although there is a general and quite proper tendency upon the part of *quasi*-judicial administrative tribunals to recognize this principle.

The extent to which, and the circumstances under which, a conclusive effect can be given by statute to the determinations of administrative tribunals with regard to questions of law and of fact are elsewhere discussed,[2] and what will be here said will be only supplementary to what is elsewhere said.

The processes employed by administrative tribunals differ from those in the courts, and, in some cases, are more summary, but they are all subject to the requirement that the essentials of due process of law shall not be denied,[3] and the courts assert the right, which cannot constitutionally be denied to them, to review all administrative determinations to an extent necessary to ascertain whether this has been done.

§ 796. Necessity for Notice and Hearing in Administrative Proceedings.

It has earlier appeared that it is fundamental to the idea of due process of law that an individual shall not have his legal rights finally determined without a notice that such rights are to be, or have been, examined and determined together with an opportunity to be heard, that is, to present such pertinent facts and arguments as he may desire in opposition to action that may adversely affect him or his proprietary interests. In most cases it will be found that, as in judicial proceedings, it is necessary that this notice should be given, and opportunity for a hearing be provided before administrative action can be taken. But where, because of the urgency of public need, or for practical reasons of administrative efficiency or effectiveness, this prior notice and hearing is not feasible, it is held that the requirements of due process are satisfied if opportunity is later given to the individual adversely affected to test the validity or propriety of the administrative action on appeal to superior administrative authorities, or on appeal to the courts, or both. In not a few cases it is held that the requirements of due process of law are satisfied by the recognition of the right of the party to test the validity of administrative action in actions of tort for the recovery of damages against the administrative officials who have exceeded their legal authority to the injury of those bringing the action.[4] In the paragraphs which follow illustrations of these propositions are given.

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[1] Murray's Lessee v. Hoboken Land and Improvement Co. (18 How. 272).

[2] See § 749.

[3] Yamataya v. Fisher (189 U. S. 86).

§ 797. Nuisances: Abatement of.

The aid of equity may be invoked for the abatement of nuisances whether public or private, or, in private nuisances, the individual may, at his own risk, himself undertake the abatement. In either case, whether by a process of court or by personal action, notice to the person responsible for the nuisance is not required where there is emergency. This constitutes an exception to the general principle that private property may not be taken or destroyed except after judicial proceedings and condemnation with notice to the owner.[5]

With reference, generally, to nuisances it may be said that it has never been recognized in this country that the legislature has a plenary, that is to say, an arbitrary, power to declare that to be a nuisance, which in actual fact is not necessarily such.[6]

§ 798. Liability of Officers Abating Nuisances.

It is established that the legislature may delegate to municipal or other administrative authorities the power to declare that certain things are nuisances and summarily to abate them as such, with or without notice or hearing. However, in those cases in which abatement is had without a previous determination by some due process of law that a nuisance in fact exists the officer acts at his peril. It is, however, in most cases a sufficient defence if the officer has acted in good faith and with reasonable grounds for believing—even though mistakenly—that a nuisance in fact existed. These principles are so well established that a citation of authorities is not needed. It is, however, to be noted that this question as to whether the officer had reasonable ground for believing that his action was justified, sometimes enables the jury to take an extreme view as to this, with the result that the officer is held liable in damages even when, to the ordinary mind, there appear to have been facts furnishing adequate reason for the officer to believe that he was justified in taking action. An instance of this was seen in the case of Lowe v. Conroy.[7]

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[4] For an excellent discussion of this general subject, see the articles by Professor T. R. Powell entitled "Administrative Exercise of the Police Power" in 24 *Harvard Law Review*, 268, 333, 441.

[5] Lawton v. Steele (152 U. S. 133); N. Am. Cold Storage Co. v. Chicago (211 U. S. 306).

[6] Wynehamer v. People of New York (13 N. Y. 378). *Cf.* Colon v. Lisk, (153 N. Y. 188, 193, 196).

There are some cases which hold that, when the administrative interference with personal liberty has been only temporary, or the interference with property of a minor character, the officer will not be held liable when acting in good faith and upon reasonable grounds, although it may later appear that the facts did not justify his action. Thus, in Brown v. Purdy,[8] the court said with reference to the removal of a person to a pesthouse: "If there was any case for his judgment, or any fact of appearance or symptom as to which a question of small-pox or not could arise, his determination was final as to the legality or propriety of removal."[9] In the opinion in the case of Valentine v. Englewood Justice Swayze gives a full argument in support of the doctrine. The author, however, is of opinion that these cases are difficult to sustain on principle. This principle would seem to be that, only where there has been an opportunity for a hearing prior to action, can the conclusiveness of an administrative determination of fact be recognized.[10]

Where, from the nature of the case, the determination of the fact at issue, as, for example, the ascertainment of the character of a commodity, which character may be ascertained by comparing it with an established standard, it has been held that a hearing is not needed.[11] And in Ekiu v. United States,[12] earlier referred to, it will be remembered that it was held that the statute was held not to require inspectors to take testimony, and that they might decide upon their own inspection, whether an alien immigrant was entitled to enter the country; but that upon habeas corpus the question could be determined by the courts whether one prevented from landing had had an opportunity to ascertain whether his detention was lawful.

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[7] 120 Wis. 151.

[8] 8 N. Y. St. Reporter, 143.

[9] See also Beeks v. Dickinson County (131 Iowa, 244); and Valentine v. Englewood (76 N. J. 509).

[10] See 5 L. R. A. 635 note.

[11] Public Clearing House v. Coyne (194 U. S. 497).

[12] 142 U. S. 651.

§ 799. Liquor Manufacturing and Selling as Nuisances.

The constitutional power of the State, or of the United States, to denominate as nuisances the manufacturing or selling of intoxicating liquors, and subject to abatement as such, has not been doubted since the decision in 1886 of Mugler v. Kansas.[13] In that case the court said: "The State having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender." [14]

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[13] 123 U. S. 623.

[14] By the Volstead Act of Congress of October 28, 1919 (41 Stat. at L. 305) it is provided (Sections 3 and 4) that premises where liquor is unlawfully sold shall be deemed public and common nuisances, and that suits in equity in the name of the United States to abate and enjoin them may be prosecuted. The jurisdiction of the Federal courts as to this is declared to be concurrent with that of the courts of the several States. The act also specifically provides for the issuance of injunctions to restrain defendants from conducting or permitting the continuance of such nuisances, and for punishment by contempt proceedings for violations of such injunctions. Under the authority thus given the so-called "padlocking" of premises by court orders has taken place. Specifically this "padlocking" is done under the provision of the Volstead Act which declares that "upon the judgment of the court ordering such nuisance to be abated, the court may order that the . . . place shall not be occupied or used for one year thereafter." The constitutionality of this provision, which permits an injunction preventing the use of premises for any purposes whatever, non-noxious as well as noxious, for a period of one year, though it has been sustained by a lower Federal court—United States v. Eilert Brewingand Beverage Co. (278 Fed. Rep. 659)—would seem to be highly doubtful. See the comments of Professor McBain in his *Prohibition, Legal and Illegal*, pp. 112–116.

CHAPTER LXXXI

DUE PROCESS AND THE REGULATION OF PUBLIC UTILITIES AND OF INDUSTRIES AFFECTED WITH A PUBLIC INTEREST

In the chapter which follows the present one an examination will be made of what is termed the police power of States under which constitutional authority is provided for the governmental regulation of all private, personal and proprietary rights in so far as this is determined to be reasonably necessary for guarding and subserving the interests of the public in matters of safety, health, morals, protection against fraud, and even public convenience.

Closely allied to this general police power, but distinct from it, is the constitutional authority recognized to be possessed by governments to regulate the charges made and the character of services to be rendered by private undertakings which are known as public utilities, or by services, and industries or occupations which are determined to be "affected with a public interest." With regard to these utilities, services, industries or occupations, it will be found that certain forms of regulation, and especially those regarding the charges which they may make for the services supplied by them, may be justified which cannot be constitutionally upheld as an exercise of police power. Thus it is that these public utilities, or services and industries or occupations affected with a public interest, while subject in common to the same police regulations to which all private employments are subject, are also, by reason of what is deemed to be their essential nature, subject to still further regulation without being entitled to assert that, by such regulation, they are denied due process of law in a substantive sense.

It has, therefore, been thought desirable to deal with this special subject before proceeding to a discussion of the police power which applies comprehensively to all private acts and to the use of all classes of private property.

§ 800. What Constitutes a Public Use.

A public use is one in which the interest of the public is directly and primarily concerned. It may happen, and, indeed, it very frequently happens, that, in the exercise of the State's powers, whether of eminent domain, taxation or police regulation, particular individuals or classes of individuals are benefited. If, however, the action is to be sustained, its aim must be shown to be not merely that this specific result will be reached as a final end, but that the public has itself an interest in securing this benefit to the individuals concerned.[1]

As to whether State pensions have a public purpose, see the author's *United States Constitutional Law,* Vol. III. Sections 1151–1154.

There are a considerable number of industries or occupations which, though privately owned and operated, are considered as essentially public in character and as such subject to public regulation as to the manner in which they shall be conducted, the services which they shall render or perform, and the charges which they may make for such services. In most, if not in all, cases these industries or occupations are ones which require and enjoy special privileges granted by the State, as, for example, the use of public property, or the right to exercise the power of eminent domain. In earlier days these so-called public employments included such trades as surgery, tailoring, smelting, baking and milling, as well as of the innkeeper, carrier, ferryman and wharfinger. At present, however, the distinctively public occupations are limited to those which avow the purpose to serve, not a select clientele, but the public generally, and which are, because of the part they play in the social and industrial economy of the people, essentially public in character.

The criteria for determining the public character of an occupation or industry, as well as the extent and modes of State regulation that may be constitutionally predicated upon such a character, will appear in the sections which follow in which is considered the relation of due process of law to occupations or industry which though not, essentially speaking, public in character, are, for all practical purposes, brought within the class of public employments by being regarded as "affected with a public interest."

In general it is to be said that the question whether an industry or occupation is of a public character or is affected with a public interest is of significance to due process of law only upon its substantive side, for, procedurally considered, the requirements of due process of law operate as fully with respect to such industries or occupations as it does to other private industries or occupations.

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[1] Though the principle governing the distinction between a public and a private use is the same for eminent domain as it is for taxation, Dr. Goodnow points out in his *Social Reform and the Constitution,* p. 318, that inasmuch as compensation is made when the former power is exercised and not when the latter is employed, the courts are apt to construe more strictly the requirment of a public purpose when taxation is involved, than when the right of eminent domain is concerned.

§ 801. Due Process of Law and Industries Affected with a Public Interest.

The Supreme Court, by the decision which it rendered in Munn v. Illinois,[2] introduced into American constitutional jurisprudence the doctrine that an industry or occupation, not in itself public in nature, may become such in fact and substantially in law by the reason of the position of importance and indispensableness it comes to occupy in the economic and industrial life of the people; in other words, that it thereby becomes "affected with a public interest" and subject to the same power and modes of State regulation as are allowable in cases of industries essentially public in nature.

That this doctrine opens a possible way to an indefinite extension of the State's regulative powers is at once apparent. In the Munn case it was applied to grain elevators, a State regulation fixing maximum rates for the storing and handling of grain being upheld. Here there were present two elements, either of which might have been accepted as a criterion for determining the inclusion of the elevators within the class of public employments. These were: first, that these warehouses were so intimately connected with the system of public carriers that they might be considered as integral parts of them; and, second, that they constituted a virtual monopoly, and, as such, being removed from the effective regulation of free competition, required public regulation. Both of these elements were dwelt upon by the court in its majority opinion, but neither made the controlling factor in the decision. Indeed, as has already been said, the general doctrine was declared that "property does become clothed with a public interest when used in a manner to make it of public consequence, and to affect the community at large." "When, therefore," the court continued, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the general good, to the extent of the interest he has thus created."

In Brass v. Stoeser [3] the doctrine of the Munn case was again applied in sustaining a law regulating grain warehouses and the weighing and handling of grain. This case was significant for the reason that, in the opinion which was rendered, the court clearly repudiated the idea that the fact of virtual or actual monopoly may be used as a test for determining whether a business has ceased to be *juris privati* and thus become subject to public regulation.

For here the law which was sustained was not limited in its application to large ports of export, and there was shown no monopoly or monopolistic tendency in the business of grain elevating in North

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[2] 94 U. S. 113.

[3] 153 U. S. 391, 403. This case is often cited as Brass v. North Dakota.

Dakota. This point was pressed upon the court, but the court said: "When it is once admitted, as it is admitted here that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstance."[4] Here it is clear that the nature of the occupation is held to be decisive, that is, irrespective of the fact whether the monopoly is, or is not, present.

§ 802. Insurance Affected with a Public Interest.

In German Alliance Insurance Co. v. Lewis[5] it was held that the business of writing fire insurance is affected with a public interest so as to permit its rates and charges to be regulated by the State. This holding involved the declaration of the doctrine that a business may be or become affected with a public interest even though no public trust is imposed upon it and the public have not a legal right to demand and receive service from it. In the course of an elaborate opinion, the court, while admitting that, in some degree, the public is interested in every private business transaction, went on to say that, in order to be subject to governmental regulation as to its charges and rates, there must be a more special public interest. This more special public interest it had been established by the earlier cases (which the court reviewed) was a fact, the court said, which was to be determined, not according to any inflexible or technical rule, but according to general considerations of public requirement. As regards fire insurance, the court pointed out that very generally it had been deemed by the States a business that required more or less special police and other regulation.

§ 803. Gasoline.

That the business of dealing in gasoline is not affected with a public interest was determined in Williams v. Standard Oil Co.[6]

§ 804. Places of Amusement or Entertainment Not Affected with a Public Interest.

In Tyson and Bro. v. Banton[7] the court had under consideration as to its constitutionality a law of the State of New York which forbade the reselling of tickets to any theatre "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry." The court refused to sustain this provision as a proper police measure, or as a proper measure for the regulation of a business affected with a public interest.

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[4] The fact that no monopoly was shown was made one of the grounds of dissent in the dissenting opinion.

[5] 233 U. S. 389.

[6] 278 U. S. 235.

[7] 273 U. S. 418, 439, 440. Both the majority and minority opinions in this case should be read for acute discussions of the criteria distinguishing enterprises affected with a public interest from those which may not be deemed thus affected.

It would seem that the court might have considered that the business the nature of which was to be examined was that of theatre ticket brokers, but, instead, it treated the case as one involving the essential nature of the business of supplying amusement or entertainment to the public. This business, it declared, was not affected with a public interest, and, therefore, that the rates at which tickets of entry might be sold, could not constitutionally be fixed or limited by the State. The court said: "A theatre is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stock yards, standing in like relation to the commerce in live stock; or an insurance company, engaged, as a sort of common agency, in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect of their interests in the fund. Sales of theatre tickets bear no relation to the commerce of the country; and they are not interdependent transactions, but stand, both in form and effect, separate and apart from each other, 'terminating in their effect with the instances.' And, certainly a place of entertainment is in no legal sense a public utility; and, quite as certainly, its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency."

§ 805. Employment Agencies Not Affected with a Public Interest.

In Ribnik v. McBride [8] the court held that while a State has the power to require a license of, and in other ways to regulate, employment agents for police purposes, their business is not affected with a public interest so as to justify the State in fixing the charges they may make for the services rendered by them. The court said: "The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker."

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[8] 277 U. S. 350, 356.

§ 806. Oil Pipe Lines.

The case of United States v. Ohio Oil Co.[9] has been earlier considered in its bearing upon interstate commerce. It needs to be here again referred to as holding not merely that the transportation of oil by means of pipe lines is a public utility, and, therefore, subject to public regulation as to its rates, charges, etc., but that a private pipe line company which transports only its own oil, and receives oil from other companies for transportation only upon condition that the oil shall first be sold to itself, is to be considered as a "public carrier" within the meaning of that term as employed in the Interstate Commerce Act of 1887 as amended by the act of June 29, 1906.[10] A company transporting only oil produced by itself, and not bought from other companies, was held not to be within the purview of the act.[11]

§ 807. Further Discussion of Criteria for Determining Occupations to Be Affected with a Public Interest.

In Wolff Packing Co. v. Court of Industrial Relations [12] was involved the constitutionality of a State law which, *inter alia*, vested in a State-established Industrial Court authority, in certain cases, to fix wages and other terms of employment in establishments for the manufacture and preparation of food for human consumption or of clothing for human wear, for the production of fuel and for its transportation. This statutory provision the court held unconstitutional as being beyond the police power and being an attempt to fix wages in employments essentially private in nature. In order to reach this conclusion, the court entered into a careful inquiry as to the criteria for distinguishing those occupations or industries which are affected with a public interest and those which are not, and attempted the following summing up, and classification of kinds of business which may properly be said to be affected with a public interest: "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills.[13] (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly." [14]

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[9] 234 U. S. 548.

[10] 34 Stat. at L. 584. This case, and other cases decided in connection with it are generally known as "The Pipe Line Cases" and are so styled in the official reports of the Supreme Court.

[11] In State Public Utilities Com. v. Bethany Mutual Telephone Assn. (270 Ill. 183) it was held by a State court that an association for the construction and operation of a telephone line for supplying service only between the members of the association was not a public utility within the meaning of the State Public Utilities Law.

[12] 262 U. S. 522, 535.

It is to be noted in the foregoing that in the third class of businesses affected with a public interest no attempt is made to cite illustrations; and that, as to the second class, the essential element justifying legislative regulation is purely an historical one, and not a special characteristic of the business included.

§ 808. Extent to which Business Affected with a Public Interest May Be Regulated Depends upon the Nature of the Business Regulated.

In Wolff Packing Co. v. Court of Industrial Relations [15] the court pointed out that all private businesses declared subject to legislative regulation, because affected with a public interest, are not subject to regulation to the same extent or in the same ways, but that, upon the contrary, they are subject to only that degree and kind of regulation which the public interest requires. The court said: "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business.

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[13] Citing State v. Edwards (86 Me. 102); Terminal Taxicab Co. v. Kutz (241 U. S. 252).

[14] Citing Munn v. Illinois (94 U. S. 113); Spring Valley Waterworks v. Schottler (110 U. S. 347); People v. Budd (117 N. Y. 1); Brass v. North Dakota (153 U. S. 391); Noble State Bank v. Haskell (219 U. S. 104); German Alliance Ins. Co. v. Lewis (233 U. S. 389); Van Dyke v. Greary (244 U. S. 39); Block v. Hirsh (256 U. S. 135).

[15] 262 U. S. 522, 539.

The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

In this Court of Industrial Relations case it was held that, the right of employer and employee to contract with respect to wages, being a part of the "liberty" protected by the due process of law provision of the Fourteenth Amendment, that part of the Kansas Court of Industrial Relations Act of 1920 was held void which, with respect to such businesses as the production of food and clothing and of mining, required employers to pay wages fixed by an Industrial Court, and forbade the employees to strike.

§ 809. Selling of Gasoline not Affected with a Public Interest.

It has been held that the selling of gasoline is not so affected with a public interest as constitutionally to justify the regulation by the States of the prices at which it may be sold.[16] Nothing is to be gained, said the court, by reiterating the statement that the phrase "affected with a public interest" is indefinite. It "has become the established test by which the legislative power to fix prices of commodities, use of property or services, must be measured. . . . We are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country."

§ 810. Power to Regulate Public Services and the Police Power Distinguished.

The constitutional authority of the State to regulate public services and the use of property affected with a public interest is often spoken of as embraced within the meaning of the so-called police power. As will later appear in this treatise, the term "police power" may be given and, indeed, originally had a signification broad enough to include within its scope all of the general regulative powers of the State and thus to embrace the specific power over public employments and those affected with a public interest. According to the writer's judgment it is, however, better to give a more restricted and more definite connotation to the term "police power" according to which the constitutional right of the State to regulate industries or undertakings affected with a public interest is not embraced within it. The police power, as a distinct branch of public authority existing under our system of constitutional jurisprudence, will be considered in the next chapter.

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[16] Williams *et al.* v. Standard Oil Co. of Louisiana. 278 U. S. 235, 239, 240.

§ 811. Right of Public Utilities to Cease Operation.

Some early cases contain the dictum that public service corporations may be compelled to continue operations even though at a continuing loss to their stockholders. In more recent cases, however, the Supreme Court has held that such compulsion would be a taking of property without due process of law. This was declared, for instance, in Brooks-Scanlon Co. v. Railroad Commission.[17] However, in that case, the court continued: "It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfil an obligation imposed by the charter even though fulfilment in that particular may cause a loss." [18]

In Bullock v. Florida [19] the doctrine of the Brooks-Scanlon case was reaffirmed, the court saying: "Apart from statute or express contract, people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. . . . No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State, and have been allowed to exercise the power of eminent domain." [20]

Public service corporations have, in cases of strikes, been required to continue to furnish service to the public, at whatever cost to themselves, by way of increased wages to their employees, or otherwise. They are, however, of course, entitled to demand for themselves, in such cases, adequate police protection.

A carrier may not excuse himself for failure to transport upon the ground that he has not sufficient equipment, for it is his absolute duty to be adequately provided.[21]

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[17] 251 U. S. 396. Citing Northern Pac. R. Co. v. North Dakota (236 U. S. 585); and Norfolk & W. R. Co. v. Conley (236 U. S. 605).

[18] Citing Missouri Pac. R. Co. v. Kansas (216 U. S. 262).

[19] 254 U. S. 513, 520.

[20] This doctrine is again affirmed in Railroad Com. v. Eastern Texas R. Co. (264 U. S. 79). See also Fort Smith Light and Traction Co. v. Bourland (267 U. S. 330). Also see generally the excellent paper of Professor Oliver P. Field, "The Withdrawal from Service of Public Utilities Companies," in 35 *Yale Law Journal*, 169.

[21] People v. N. Y. Central & H. R. R. Co. (28 Hun. 543).

CHAPTER LXXXII

DUE PROCESS OF LAW AND THE POLICE POWER

§ 812. Development of the Doctrine of Police Power.

In the pages which have gone before it has been frequently necessary to refer, in justification of legislative acts, to what is called the "Police Power." It is now proposed to consider more carefully the constitutional connotation of this term.

In the sense in which the expression "police power" has come to have in this country the term is peculiar to American constitutional jurisprudence, and is a development out of the principle that the law-making powers of Congress and of the State legislatures are limited by written constitutional provisions. Indeed, in view of the force given to these constitutional provisions, and especially in view of the broad meaning, procedural and substantive, given to the requirement of due process of law, the development of a doctrine of a police power inherent in the State legislatures to override, under certain circumstances, private rights of person and property, was absolutely necessary in order that the State governments might efficiently preserve public order and secure the general welfare of their citizens.[1]

But, just as the wide extension of the meaning of due process of law is of comparatively recent date, so the sphere of authority at present ascribed by the courts to the police powers of the States is modern.[2] Indeed, as we shall see from a study of the latest cases, the State's police powers are, at the present time, in a process of rapid development, and like the struggle between Ormazd and Ahriman, the contest between the restraining power of due process of law and the legitimizing energy of police control furnishes much of the material of present-day constitutional disputes. Those who favor an extension of State control would identify the police power with the being Ormazd; while those who view with fear further inroads upon individual liberty of action and the sanctity of private property rights would be disposed, no doubt, to view due process as the constitutional Ormazd, and the police power, in its wider extensions at least, as representing Ahriman.

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[1] Strictly speaking the Federal Government cannot be said to possess police powers in the sense that the States do. It does, however, possess, in connection with the powers expressly granted it, the implied power to enact what in substance are police regulations. Thus, for example, in the exercise of its authority, to regulate interstate and foreign commerce, Congress has enacted a pure food law, safety applicances acts, prohibited the transportation of lottery tickets, etc.

[2] The term is not defined in Bouvier's *Law Dictionary* until the edition of 1883; in 1879 it makes it first appearance as a subdivision of constitutional law in the annual supplements of the *United States Digest.* Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State,* p. 360.

The first appearance of the term "police power" in American constitutional nomenclature would seem to be in 1827 in the case of Brown v. Maryland,[3] in which Chief Justice Marshall declared that "The power to direct removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the States." [4] Not until ten years later, however, did the phrase recur in an opinion of the Supreme Court. This was in Mayor of New York v. Miln.[5] Here Justice Barbour quoted the words of Marshall in Brown v. Maryland, and Justice Thompson in his opinion said: "Can anything fall more directly within the police power and internal regulation of the State than that which concerns the care and management of paupers or convicts?"

In these early cases, and for years to follow, as Hastings in his study has made demonstrably clear, the phrase "police power" when it occurred was employed as a name for what the *Federalist* and later commentators had described as "the residuary sovereignty of the States," namely, that general authority not surrendered to the General Government, and reserved severally by each State to regulate in the manner that each should see fit all matters of local concern. In other words, the term was not used to designate a special branch or sphere of the States' legislative authority; rather, it was employed to mark off the sphere of State authority from that of the General Government. In this sense the phrase soon became generally current.[6] Gradually, however, in this contest between the States and the General Government, and especially with reference to the control of interstate commerce, there arose the practice of justifying, or attempting to justify, the enforcement by the States of regulations affecting interstate commerce, and other subjects placed within the control of the General Government, by arguing that the regulations in question were necessary or reasonably required for the protection of the health, morals or general welfare of the citizens of the States enacting them, which subjects, it was asserted, are subject to the States' control in the exercise of their residual sovereignty or police powers notwithstanding the fact that, in the exercise of this regulating power Federal concerns are incidentally affected. Thus the phrase "police power," by degrees, came, in practice, to refer not to the general residuary powers of the States but to their right to provide and enforce reasonable regulations in behalf of the morals, safety and convenience of their inhabitants, even when interstate commerce or some other subject of Federal control was incidentally or indirectly, though often substantially, affected.

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[3] 12 Wh. 419.

[4] Hastings, p. 365.

[5] 11 Pet. 102. *Cf.* Hastings, p. 366.

[6] See especially Prigg v. Pennsylvania (16 Pet. 539), decided in 1842, and the License Cases (5 How. 504), decided in 1846. In the latter cases Chief Justice Taney said: "What are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion . . . that is to say, this power of sovereignty, the power to govern men and things within the limits of its own dominions."

Though thus growing out of the contest between Federal and State authority, the phrase "police power," when it had come to have the special meaning just referred to, began to find aplication as designating a field of legislative authority to regulate private rights of persons and property free from the constitutional objection that due process of law was thereby denied.

§ 813. Police Power Defined.

One of the earliest as well as most satisfactory definitions of the police power is that of Chief Justice Shaw, given in his opinion in Commonwealth v. Alger[7] decided in 1853. He said: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor.[8] The power we allude to is rather the police power, the power vested in the legislature by the

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[7] 7 Cush. 53, 84, 85.

[8] This requirement of compensation in the case of appropriation of private property under the right of eminent domain, is created in this country by express constitutional provisions. In the absence of such constitutional provisions, express and implied, the individual thus deprived of property would have no legal claim for damages. To the author it appears proper to classify the power of eminent domain under the general police powers of the State.

Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise."

Next in importance after Commonwealth v. Alger in developing the modern definition of police power was Chief Justice Redfield's opinion in Thorpe v. Rutland R. R. Co.,[9] decided in 1855. Here we find the following language used: "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country which resides in the law-making power in all free States. . . . This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."

With its definition and scope thus squarely asserted by Shaw and Redfield, the police power of the State almost immediately found an important application in the State courts as justifying especially the liquor and Sunday laws of the States.

§ 814. Necessity for Exercise of Police Power a Matter Primarily of Legislative Judgment.

In Mugler v. Kansas [10] in which a State law prohibiting the sale or manufacture of intoxicating liquor was upheld as an exercise of the police power, the court used the following language: "By whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? . . . Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

§ 815. Legislative Determination not Conclusive.

Though given considerable weight, the legislative determination as to the justification, in specific instances, of the exercise of the police power, is not regarded as conclusive by the courts.[11]

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[9] 27 Vt. 140.

[10] 123 U. S. 623.

[11] See, for example the language of the court in Powell v. Pennsylvania (127 U. S 678).

The authority upon the part of the court itself to determine, upon a basis of fact, whether, under given circumstances, police regulation is required, does not carry with it, the court has several times taken care to assert, a claim of right to substitute its judgment for that of the legislature as to the policy or expediency of the regulation which is provided. Thus, in Lochner v. New York [12] it said: "If the act be within the power of the State, it is valid, although the judgment of the court might be totally opposed to the enactment of the law."

In Müller v. Oregon [13] the court recognized that there is a "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil," and while admitting that constitutional questions are not settled by even a consensus of public opinion, yet, "when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration." The court then went on to state as its own belief that women, by their physical structure, are placed at a disadvantage in the struggle for subsistence, and that this is especially true when the burdens of motherhood are upon them. In this case the court upheld a law prohibiting the employment of women in laundries for more than ten hours in any one day.

§ 816. Opportunity for Division of Judicial Opinion as to Reasonableness of Police Measures.

It is clear that there is abundant opportunity for differences of opinion among judges as to the reasonableness, and therefore the constitutionality, of police measures submitted to them. It is therefore not surprising to find dissents recorded in many of the decisions of the Supreme Court in cases of this class.

Examples of comparatively recent cases in which the majority of the court over vigorous dissents of the minority has construed with strictness constitutional limitations and correspondingly limited discretionary legislative powers are those of Burns Bakery Co. v. Bryan,[14] Weaver v. Palmer Bros. Co.,[15] and the Minimum Wage case of Adkins v. Children's

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[12] 198 U. S. 45. See also C. B. & Q. R. R. Co. v. McGuire (219 U. S. 549). However, in the so-called Bakery Case —Lochner v. New York (198 U. S. 45)—it must be confessed that the court did not give to the legislative judgment that weight which might have been given to it. In this case the court held invalid a State law regulating the labor hours and other conditions of employment of adult bakers.

[13] 208 U. S. 412.

[14] 264 U. S. 504.

[15] 270 U. S. 402.

Hospital.[16] The Minimum Wage case is elsewhere discussed in detail. The other cases just mentioned may be here described.

In the Burns Bakery case was held unconstitutional as in denial of due process of law, substantively considered, a statute which required bread manufactured in quantities of twenty-five loaves or more to maintain a specified weight twenty-four hours after baking, within a limit of variation so narrow as to permit the required weight to be maintained only if the loaves should be wrapped or otherwise artificially protected. This requirement the court found, by the evidence in the case, to be unreasonable.

In Weaver v. Palmer Bros. Co.[17] the court held void as a denial of due process of law a State statutory provision which prohibited the use of shoddy, new or old, sterilized or unsterilized, in the manufacture of comfortables for beds.

§ 817. The General Scope of the Police Power.

From what has been said it sufficiently appears that the police power knows no definite limits. It extends to every possible phase of what the courts deem to be the public welfare:—it is a general right upon the part of the public authority to abridge, or, if necessary, to destroy, without compensation, the property or contract rights of individuals, and to control their conduct in so far as this may be necessary for the protection of the community or of a particular class of the community, against danger in any form, against fraud, or vice, or economic oppression, or even for the securing of the public convenience. As is said in the Bank Guaranty case,[17a] "It may be said in a general way that the police power extends to all the great public needs." And in C., B. & Q. R. R. Co. v. Grimwood,[18] decided in 1906, the court said: "We hold that the police power of a State embraces regulations designed to promote the public convenience and general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." [19]

In Bacon v. Walker [20] the court defined the police power as embracing "regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

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[16] 261 U. S. 525.

[17] 270 U. S. 402.

[17a] Noble State Bank v. Haskell (219 U. S. 104, 111). But see 219 U. S. 575 where rehearing of this case was denied and the definition quoted in the text somewhat qualified.

[18] 200 U. S. 561.

[19] See also Lake Shore & M. S. R. R. Co. v. Ohio (173 U. S. 285).

[20] 204 U. S. 311.

In Eubank v. Richmond[21] the court said of the police power: "It extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

§ 818. Police Power and Right to Regulate Public Utilities Distinguished.

The power that is recognized to be possessed by the State for the regulation of industries of a public character, or industries affected with a public interest, is deduced from the peculiar public, or partly public character, of the industries regulated. The field open for legal regulation is thus a comparatively limited one even though its boundaries are somewhat indefinite. The right of control exercisable under the police power is, however, coextensive with the social and economic activities of men, and finds its limits not in the public or *quasi*-public character of the industries affected, but in the nature of the acts forbidden or required, and founds its justification upon the direct relation of these acts to the public welfare.

The fundamental principle which is held to justify this exercise of State power is that no one shall so use his property or exercise any of his legal rights (*i. e.*, legal in the sense of not being forbidden by law) as injuriously to interfere with or affect the property or other legal rights of others. The guiding maxim is *sic utere tuo ut alienum non lædas.* The purpose and possible result of the police law being shown, the fact that, indirectly, private interests or property values are affected, becomes immaterial, and the persons detrimentally affected have no claim upon the State for compensation. Theirs is a case of *damnum absque injuria.*

§ 819. The Police Power May Not Be Abandoned or Contracted Away.

It has earlier been pointed out that the States may, as to specific enterprises, agree not to exercise their right to tax. It is, however, established that the States may not thus contract away their right to exercise such police regulation as future conditions may warrant. In Stone v. Mississippi[22] the court said explicitly: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both of these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require."

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[21] 226 U. S. 137.

[22] 101 U. S. 814. See also Fertilizer Co. v. Hyde Park (97 U. S. 659); Butchers' Union Slaughter House Co. v. Crescent City Slaughter House Co. (111 U. S. 746).

In Atlantic Coast Line R. Co. v. Goldsboro [23] the court said: "For it is settled that neither the 'contract' clause not the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

§ 820. Limited Right to Regulate or to Prohibit the Innoxious along with the Noxious.

The police power may not be employed to prevent evils of a remote or highly problematical character nor may its exercise be justified when the restraint imposed upon the exercise of private rights is disproportionate to the amount of evil that will be corrected. However, the fact that, as a matter of practical operation, innocent parties or property will necessarily be affected to some slight extent, will not render the regulation unconstitutional. Furthermore, acts innocent in themselves may be ordered or prohibited if this be practically necessary in order to secure an efficient enforcement of a valid police order. Thus, in Purity Extract and Tonic Company v. C. C. Lynch [24] it was held that local sales of malt liquors, whether intoxicants or not, might be forbidden in the exercise of the State's power to prohibit the sale of intoxicating liquors, because experience had shown that, if the sale of the former were permitted, it would not be possible effectively to prevent the sale of the latter under the guise of the former.

In Village of Euclid v. Ambler Realty Co.[25] the court, with reference to a "zoning" ordinance which was declared reasonable, said that the general exclusion from certain zones of all industrial establishments might carry with it some establishments for the exclusion of which there might not be justification, "but," said the court, "this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves."

While thus holding that the zoning ordinance was, in its general character, reasonable as a police measure, the court pointed out that, as applied to specific pieces of property, or under specific circumstances, it might be held unreasonable.

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[23] 232 U. S. 548.

[24] 226 U. S. 192.

[25] 272 U. S. 365. For other recent cases dealing with zoning ordinances, see Nectow v. City of Cambridge (277 U. S. 183); State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge (278 U. S. 116).

In Everards Breweries v. Day [26] the court with reference to and in support of the constitutionality of the prohibition by Congress of the traffic in intoxicating malt liquors for medicinal purposes, said: "The opportunity to manufacture, sell, and prescribe intoxicating malt liquors for 'medicinal purposes' opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion; and thereby and to that extent hampers and obstructs the enforcement of the Eighteenth Amendment."

However, this doctrine in justification of the inclusion of what may be termed innocent acts may be applied only as a means to a legitimate end, and may not be relied upon to sustain a measure so loosely or broadly drawn as to bring within its scope matters which are not properly subject to police regulation or prohibition.[27]

§ 821. Taxation as a Mode of Exercising Police Regulation.

Police regulations may assume any form of control reasonably calculated to achieve the end aimed at. Thus, at times, stamp taxes and other forms of assessments resembling taxes have been imposed not so much for the purpose of the revenues to be derived from them as for the purpose of administrative control. When this is done the validity of the statutory requirements is determined upon the basis of the police power and not that of the taxing power.

§ 822. The Police Power and Compensation for Injuries Due to Its Exercise.

Sufficient has now been said to define and illustrate the potential scope of the police power. It is seen that this power resembles those of taxation and eminent domain not only in the fact that, like those powers, it involves an authority upon the part of the State to invade private property rights, but that its exercise must be founded upon a basis of public, as distinguished from private, use or interest.

There are, however, these essential differences between the police power and those of taxation and eminent domain that, under the police power, private property cannot, except in very special cases, which will be presently considered, be taken by the government (though it is sometimes destroyed) but only its use regulated, and, second, that when, through restraint in its use, the value of property is depreciated or destroyed, no compensation may be recovered from the State by its owner. This principle was stated in fixed terms by the court in Mugler v. Kansas,[28] and has not been since questioned.

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[26] 265 U. S. 545, 561.

[27] See, for example, Tyson & Bro. v. Banton (273 U. S. 418); and Adams v. Tanner (244 U. S. 590).

[28] 123 U. S. 623.

§ 823. The Taking of Private Property under the Police Power.

The primary purpose of the police power, as well as that of eminent domain and taxation, is protection or prevention—that persons may be restrained from so exercising their private rights of property, contract, or conduct as to infringe the equal rights of others or to prejudice the interests of the community. It may, therefore, be said, generally, that under none of these powers may private property be taken, with or without compensation, for a private use. We have now to ask whether, under any considerations, private property may be not only regulated as to its use, or destroyed if in itself noxious, but directly appropriated by the State, or its transfer by its owner to other private hands compelled.

The destruction of the values of property through the exercise of the police power was earlier viewed by the courts with a more hostile eye than is now the case.[29]

In Mugler v. Kansas,[30] however, the court definitely committed itself to the doctrine that no constitutional objection can be made to a police measure, otherwise valid, which, without compensation provided for, in its operation, deprives of value private property existing at the time the law is passed.

The destruction of the value of property by prohibiting the use of it for the only purpose for which it is adopted, is, however, sharply distinguished from its actual taking, as will appear in the discussion which follows of the State Bank Guaranty Case.[31]

§ 824. State Bank Guaranty Case.[31a]

In Noble State Bank v. Haskell, decided in 1911, the Supreme Court upheld the State Bank Guarantee Law of Oklahoma, which provided for the compulsory levy and collection of assessments based upon average daily deposits, from State banks, for the purpose of creating a guaranty fund for the payment in full of all depositors of such banks as might become insolvent; and which also provided that no individual or corporation should do a banking business in the State except under this law. Justice Holmes, speaking for a unanimous court, admitted that there was no denying that by the Oklahoma law a portion of the bank's property might be taken to pay the debts of an insolvent rival. Nevertheless, he said there were counteracting considerations in support of the validity of the law. "In the first place," he said, "it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use [32] . . . And, in the next, it would seem that there may be other cases besides the everyday one of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." [33]

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[29] See, for example, the language of the court in Wynehamer v. People of New York (13 N. Y. 378); Bartemeyer v. Iowa (18 Wall. 129); and Boston Beer Co. v. Massachusetts (97 U. S. 25).

[30] 123 U. S. 623.

[31] 219 U. S. 104; 219 U. S. 575.

[31a] 219 U. S. 104, 110; and 219 U. S. 575, 580.

On motion for rehearing Justice Holmes somewhat modified, or at least explained, some of the language which has been quoted. After referring to cases referred to in the original opinion, he declared that they were cited to establish "not that property might be taken for a private use, but that, among the public uses for which it might be taken, were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private." "This case," he added, "in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state. We have given what we deem sufficient reasons for holding that such a condition may be imposed."

Having sustained the law as a legitimate exercise of the State's police power, the court went on to declare the further doctrine that, in fact, the banking business is one of such special character that no one can be said to have a vested right to engage in it, and, therefore, to complain if he is excluded from it or permitted to engage in it only upon such terms as the State may see fit to impose.

§ 825. Professions or Occupations: Right to Pursue.

It is well established that, for the purpose of protecting the health of their citizens or for guarding them against fraud, the right of individuals to pursue certain professions may be conditioned upon the possession by such individuals of certain personal qualifications either by way of personal or moral qualities or of technical attainments; and, therefore, that, for entrance to such professions a license obtained from the State may be demanded. Among such callings or professions may be instanced those of physicians, dentists, druggists, engineers, barbers, plumbers, private detectives, pawnbrokers, auctioneers, peddlers, not to mention many others. The State cases upon this point are very numerous, but all agree upon the general principle. The only diversity of opinion has been, in specific instances, as to whether a profession or calling is of such a nature as to justify police regulation, or as to whether, if subject to such State control, the regulations prescribed have been reasonable in character.[34]

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[32] Citing Clark v. Nash (198 U. S. 361); Strickley v. Highland Boy Gold Mining Co. (200 U. S. 527); Offield v. N. Y., N. H. & H. R. Ry. Co. (203 U. S. 372); Bacon v. Walker (204 U. S. 311).

[33] Citing Ohio Oil Co. v. Indiana (177 U. S. 190).

In Lambert v. Yellowley [35] it was held that the liberty of physicians or of their patients was not unconstitutionally denied by the provisions of the National Prohibition Act of 1919,[36] as supplemented by the act of 1923 [37] which limits the amount of spirituous liquor which physicians may prescribe. To the contention of the plaintiff, a qualified physician, that he believed that the use of spirituous liquors in larger amounts than that permitted by the act was sometimes both advisable and necessary, the court replied: "Of course his belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown to Congress to be the minor fraction of his profession. Besides, there is no right to practice medicine which is not subordinate to the police power of the States." [38]

§ 826. Pharmacies.

In Liggett Co. v. Baldrige [39] a State law was held not to be a justified exercise of the police power which provided that every pharmacy or drug store should be owned only by a licensed pharmacist, and that no corporation, association or copartnership should own a pharmacy or drug store unless all the partners or members thereof were licensed pharmacists. The court, while conceding that the State might regulate the prescription, compounding of prescriptions, and the purchase and sale of medicines by appropriate legislation to the extent necessary to protect the public health, could find no reason why the public health was endangered by the character of the persons who might have title to premises used for the compounding of prescriptions or the purchase and sale of drugs. "The claim," said the court, "that the mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance."[40]

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[34] Among the cases upon this point reaching the Supreme Court are: Smith v. Texas (233 U. S. 630); Adams v. Tanner (244 U. S. 590); Dent v. West Virginia (129 U. S. 114); Watson v. Maryland (218 U. S. 173); Roschen v. Ward, (279 U. S. 337).

[35] 272 U. S. 581.

[36] 41 Stat. at L. 305.

[37] 42 Stat. at L. 222.

[38] Citing Dent v. West Virginia (129 U. S. 114); Collins v. Texas (223 U. S. 288); Crane v. Johnson (242 U. S. 339); and Graves v. Minnesota (272 U. S. 425).

[39] 278 U. S. 105.

§ 827. Control of Natural Resources such as Oil and Gas.

The courts have recognized upon the part of governments the right to exercise a certain amount of control over the reduction to possession of natural resources such as oil and gas with a view to preventing their waste, and thus conserving the natural supplies of them. This, though an interference with private property rights, the courts have justified as measures for the protection or promotion of the general welfare.[41]

§ 828. "Blue Sky" Laws.

In a considerable number of States since 1910, laws known as "Blue Sky" Laws, have been passed to protect the public against the sale of fraudulent securities. The constitutionality of several of these measures was upheld by the Supreme Court in the three cases, decided in 1917, of Hall v. Geiger-Jones Co.,[42] Caldwell v. Sioux Falls Stock Yards Co.,[43] and Merrick v. N. W. Halsey & Co.[44]

In Broadnax v. Missouri [45] it was held that a State might declare criminal the keeping of a place where corporate stocks and bonds and grains, provisions, and other commodities are bought and sold, but not paid for and delivered at the time, and where no complete record of the transactions, including a minute of the time of delivery, is made in a book kept for the purpose, and no memorandum of the sale properly stamped is given to the purchaser.

§ 829. Trading Stamps.

The use by many merchants of issuing trading stamps or coupons in connection with their retail sales, which stamps or coupons purport to be redeemable, when a sufficient number are obtained, in goods, has in many States been viewed with disfavor, with the result that those States have imposed special burdens upon the practice which, in some cases, have been prohibitive in effect. In most of the States these laws have been held invalid as arbitrarily discriminating against a legitimate business practice. However, in Rast v. Van Deman & Lewis Co.,[46] Tanner v. Little,[47] and Pitney v. Washington,[48] three cases decided at the same time, the Supreme Court sustained statutes of this kind.

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[40] Justices Holmes and Brandeis dissented.

[41] Lindsley v. Natural Carbonic Gas Co. (220 U. S. 61); and Walls v. Midland Carbon Co. (254 U. S. 300).

[42] 242 U. S. 539.

[43] 242 U. S. 559.

[44] 242 U. S. 568.

[45] 219 U. S. 285.

[46] 240 U. S. 342.

[47] 240 U. S. 369.

[48] 240 U. S. 387.

§ 830. Zoning.

In Welch v. Swasey [49] a law regulating the heights of buildings, when shown to be reasonably necessary for the safety, comfort and convenience of the public, was upheld. In many cities, building regulations have gone beyond this and have attempted to divide the cities into "zones" or districts within each of which only specifically described buildings may be erected. Usually, these zones have been of three classes: residence, business, and unrestricted. In Village of Euclid v. Ambler Realty Co.[50] an ordinance was upheld which established a comprehensive and detailed regulation according to six zones which restricted the location of trades, industries, apartment houses, two-family houses, single-family houses, the lot areas to be built upon, the height of buildings, etc.

The court pointed out that the validity of such zoning would depend upon the circumstances of each case, that what might be reasonable and therefore valid as applied to great cities might be unreasonable and therefore invalid as applied to smaller urban centers. In the instant case the court found the restrictions reasonable from a police point of view.

In Gorieb v. Fox [51] it was held that forbidding owners of property bordering on a public street to construct buildings nearer than a specified distance from the street line was not a denial to them of due process of law; nor was there a denial of the equal protection of the laws by reason of the provision that, for good reasons, exceptions as to certain buildings might be made. Should this discretionary right to make exceptions be abused, the court would then, and not until then, take cognizance of abuse.

In Nectow v. City of Cambridge [52] it was held that the inclusion of private land within a residential district in a zoned district with the result that its use for business or industrial purposes caused such a damage to its owner as to deprive him of property without due process of law. The court found, from the facts of the case, that the zoning ordinance in question could not be defended as a police measure.

In State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge [53] it was held that a zoning ordinance was unconstitutional insofar as it gave to an official of the city what amounted to an arbitrary right to refuse to grant a permit for the erection of a building within a zone. The refusal to grant the permit in this case had been based upon the ground that the petitioner for it has failed to show that he had obtained the consent of other property owners as provided for by the ordinance. The court, however, found that there was nothing in the record to show that the proposed building, if erected and maintained for the purposes proposed—a home for the aged poor—would work injury, inconvenience or annoyance to the community, the district or to any person. The case was thus distinguishable from Cusack Co. v. City of Chicago.[54] The fact, that the ordinance provided that, the consent of other property owners being obtained, buildings of the class of the one in question might be permitted, showed, said the court, that the exclusion of such a building was not, by its very nature, indispensable to the general zoning plan. "We need not decide," the court said, "whether, consistently with the Fourteenth Amendment, it was within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration."

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[49] 214 U. S. 91.

[50] 272 U. S. 365. See also, Zahn v. Board of Public Works of Los Angeles (274 U. S. 325).

[51] 274 U. S. 603.

[52] 277 U. S. 183.

[53] 278 U. S. 116.

§ 831. Rents: Regulation of.

Illustrations of the extreme extent to which the States in the exercise of their police powers may, under certain circumstances, regulate private proprietary rights were exhibited in Block v. Hirsh,[55] Levy Leasing Co. v. Siegel,[56] Marcus Brown Holding Co. v. Feldman,[57] and Chastleton Corporation v. Sinclair [58] with reference to the limitation of rents.

In the first of these cases the court upheld a section of an act of Congress of 1919 [59] for the District of Columbia which declared that, because of exigencies growing out of the World War, rental conditions in the District had become dangerous to the public health and burdensome to public officers, employees, and accessories, and was thereby embarrassing the Federal Government in the transaction of the public business, and that, this being so, declared the right of tenants to remain in possession of rented quarters after the expiration of their leases on payment of the rent, or performance of other conditions fixed by their leases, unless such rent should be modified by a commission established by the act. The court declared that the public exigency had operated, for the time being at least, to clothe the business of renting residences in the District with a public interest, and, therefore, that it might be regulated to the extent to which that interest might require. The court pointed out that the act provided machinery for securing reasonable rents to landlords, but conceded that it might be assumed that the interpretation of "reasonable" would deprive them in part at least of the power of profiting by the sudden influx of people to Washington City by reason of the war, and thus deprive them of a right usually incident to the ownership of favorably situated private property. "But," said the court, "while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws. The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

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[54] 242 U. S. 526.

[55] 256 U. S. 135, 157.

[56] 258 U. S. 242.

[57] 256 U. S. 170.

[58] 264 U. S. 543.

[59] 41 Stat. at L. 298.

In Marcus Brown Holding Co. v. Feldman [60] a law of 1920 of the State of New York was upheld which prohibited, until November 1, 1922, actions to recover possession of real property occupied for dwelling purposes in a city of one million inhabitants or more, except upon certain grounds. The case was held to be governed by that of Block v. Hirsh, and the law held to be not unconstitutionally discriminatory because of the exclusion from its provisions of buildings occupied for business purposes, of hotels, and buildings in course of erection.

In Levy Leasing Co. v. Siegel [61] the doctrine of Marcus Brown Holding Co. v. Feldman was reaffirmed.

In Chastleton Corporation v. Sinclair [62] it was declared that a police legislation justified as an emergency measure, would cease to be constitutional in its operation after that emergency has passed, and that whether the rent act of Congress with reference to the District of Columbia should no longer be enforced would depend upon the facts that might be adduced. These facts, the court said, could, in the instant case, be most conveniently examined and weighed in the Supreme Court of the District of Columbia.

§ 832. Due Process of Law and Æsthetics.

Although it has been held that, under its police power, the State may protect its people against undertakings which are offensive to their sense of smell or to their hearing, it has been held that it may not thus protect them against objects or representations which are unsightly, except in so far as such objects or representations may be of an immoral or indecent character. The reasons for this discrimination would appear to be in part a lack of conviction on the part of the courts that ugliness can be so disagreeable or painful to the individual that he needs to be protected against it, and, in part, and perhaps principally, to the fact that the æsthetic sensibilities of individuals are so subjective in character and, therefore, so varying, that it is not practicable for the legislatures or for the courts to determine concretely and specifically what objects or representations are sufficiently unsightly, or deemed such by a sufficient generality of people, to justify the prohibition of their presentation to the public eye. It is, however, to be observed that there are instances in which the courts would appear to have been strengthened in their disposition to sustain legislative or administrative regulations upon grounds of morals or public safety by reason of the fact that the structures in question have also been indubitably of an unsightly character. So also with regard to the sustaining of so-called "zoning" laws there is ground for saying that æsthetic considerations have not been absent. However, there are practically no cases, State or Federal, in which the control of the use of private property under the police power has been sustained by the courts solely and expressly upon the ground that the prohibited structures or representations would be disagreeable or painful to the æsthetic sense of the public.

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[60] 256 U. S. 170.

[61] 258 U. S. 242.

[62] 264 U. S. 543.

It may be observed that the use of the right of eminent domain for the purpose of provision of parks or the erection of monuments, or other structures for beautifying cities, towns, etc., has been frequently exercised without constitutional objection by the courts.[63] Closely connected also with the æsthetic value of such monuments, etc., has been their influence in stimulating patriotism, which influence the courts have held to furnish a legitimate ground for public expenditures.[64] The æsthetic motive in the provision of public parks and national reservations has of course been present, and, in some cases, undoubtedly dominant, but the courts have been able to justify them on the safer constitutional ground of their promotion of the public health by providing "breathing spaces" and opportunities for recreation. So, also, with regard to regulations of the height of buildings the courts have been able to sustain them upon grounds of public safety or health, although the moving consideration for their enactment or issuance has, in no small part, been an æsthetic one.[65]

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[63] See the article "Municipal Æsthetics and the Law" by N. F. Baker, in 20 *Illinois Law Review*, 546.

[64] In United States v. Gettysburg Electric R. Co. (160 U. S. 668, 681), the court said: "Any act of Congress which plainly and directly tends to enchance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some or one all of the powers of Congress must be valid."

[65] In Welch v. Swasey (193 Mass. 364), we find the Supreme Court of Massachusetts saying: "The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light, and air, and thus

§ 833. Billboards.

The legitimacy of the exercise of police powers for æsthetic purposes has been frequently invoked to sustain municipal ordinances regarding billboards. These structures, when upon private property, have been held subject to regulation only when the courts have been able to find some justification from the standpoints of morals, or protection against fires, or public safety. In Haller Sign Works v. Physical Culture Training School [66] the court, holding invalid a statute prohibiting the erection of structures for advertising purposes within five hundred feet of any public park or boulevard, said: "However desirable it may be to encourage an appreciation of the beautiful in art, and to cultivate the taste of the people of the State, still it has never been the theory of our Government that such matters could properly be enforced by statute, when not connected with the safety, comfort, health, morals and material welfare of the people. Advancement along these lines, whether wisely or unwisely, has, so far, been left to the schools and colleges and the influence of social intercourse." [67]

In Thomas Cusack Co. v. Chicago [68] was held valid a municipal ordinance which forbade the erection of any billboard or signboard over twelve square feet in area in any city block in Chicago in which one-half of the building on both sides of the street was used exclusively for residence purposes, without first obtaining the written consent of the owners of a majority of the frontage on both sides of the street in such block. The State court had upheld this ordinance as a reasonable police regulation against fire, against offensive and unsanitary accumulations, and the furnishing of opportunity for immoral practices and the gathering of loiterers and criminals. The Federal Supreme Court held that there was nothing so unreasonable in such a holding as to justify it in opposing its own judgment of fact to that of the State authorities.

§ 834. Obligation of Contracts and Due Process of Law.

No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts.

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affect the public health. It may also increase the danger to persons and property from fire and be a subject for legislation on that ground."

Upon appeal to the Supreme Court of the United States, the holding of the Massachusetts court in this case was affirmed. The law upheld in the case was one which limited the maximum height of buildings in the commercial district of Boston to 125 feet, and in residential districts to from 80 to 100 feet. (214 U. S. 91, 92.)

[66] 249 Ill. 436; 94 N. E. Rep. 920.

[67] See also Commonwealth v. Boston Avdertisement Co. (188 Mass. 348); Bryan v. Chester (212 Penna. 259); Bill Posting Sign Co. v. Atlantic City (71 N. J. L. 72). See other cases cited by Mr. Baker in the article "Municipal Æsthetics and the Law," 20 *Illinois Law Review*, 546.

[68] 242 U. S. 526.

That Government is, however, forbidden by the Fifth Amendment to deprive persons of property without due process of law or to take private property for a public use without just compensation. In so far, then, as contract rights may be treated as property they are protected from direct impairment by Federal action. This was definitely declared, as we have earlier seen in the first legal tender decision of Hepburn v. Griswold.[69]

Contracts are not, however, protected from an indirect impairment of their obligation when this incidentally results from the exercise by Congress of a legislative power constitutionally given to it. Thus, in Knox v. Lee,[70] in which, reversing the opinion in Hepburn v. Griswold, it was held that, under its power to carry on war and to maintain its own existence, the Federal Government might authorize the issuance of legal tender notes valid in payment of debts previously contracted,[71] the court denied that the obligation of contracts was thereby impaired; but they went on to say, even if it were held that the obligation of contracts was thereby impaired, that would not be constitutionally objectionable.

"Nor can it be truly asserted," the opinion declared, "that Congress may not, by its action, indirectly impair the obligation of contracts if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly by passing a Bankrupt Act, embracing past as well as future transactions. . . . So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or even in peace, pass non-intercourse acts, or direct an embargo."

With reference to the due process of law requirement of the Fifth Amendment, the court said: "That provision has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft or a war, may inevitably bring upon individuals great losses; may indeed render valuable property almost valueless. They may destroy the worth of contracts." But such laws, of course, are not, therefore, void.

In the Sinking Fund Cases,[72] it was declared: "The United States cannot any more than a State interfere with private rights except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law."

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[69] 8 Wall. 603.

[70] 12 Wall. 457.

[71] In a still later case, Juilliard v. Greenman (110 U. S. 421), it was held that the power to issue legal tender notes is implied in the power to borrow money, as well as from other express powers, and, therefore, may be exercised in times of peace as well as of war.

[72] 99 U. S. 700.

CHAPTER LXXXIII

DUE PROCESS OF LAW AND PERSONAL LIBERTY: THE FREEDOM TO CONTRACT: WAGE CONTRACTS

§ 835. Liberty Defined.

In further protection of the substantive rights of individuals against public regulation the courts have developed a broad conception of "liberty" which makes it include not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into contractual relations. So far as the use of one's private property is concerned, the right is viewed as also a property right as has earlier appeared. So far as the right to enter into contracts is concerned, it also is sometimes viewed as a property right, but more often as included within the broadened conception of liberty.

In Allgeyer v. Louisiana [1] the court, defining liberty, said: "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned. . . . In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

With this definition of liberty may be compared the following definition, by the Supreme Court of Illinois, of property as including the idea of liberty as well. "The right of property, preserved by the Constitution," said the court, "is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." [2]

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[1] 165 U. S. 578, 589, 591.

[2] See Braceville Coal Co. v. People (147 Ill. 66). *Cf.* McGehee, *Due Process of Law*, p. 141.

In Meyer v. Nebraska [3] the court said: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

§ 836. Personal Liberty: Compulsory Vaccination.

In Jacobson v. Massachusetts [4] it was strenuously contested that a State law which required citizens to submit themselves to anti-smallpox vaccination was an unconstitutional violation of their personal liberty—that such compulsion was nothing short of an authorized assault upon their persons. The Supreme Court, however, upheld the law, saying: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." [5]

The court declared that the law in question was a sanitary law and pointed out that the vaccination was to be required only when, in the opinion of the local health authorities, the public health or safety demanded it.

§ 837. Sterilization.

In a number of States laws have been passed for the sterilization of certain classes of criminals and of insane and feeble-minded persons. In Buck v. Bell [6] one of these laws relating to the sterilization of feeble-minded persons was upheld by the Supreme Court as a reasonable police measure.

§ 838. Liberty of Teaching.

In Meyer v. Nebraska [7] the court held unconstitutional a State law which prohibited the teaching of any subject in any language other than

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[3] 262 U. S. 390, 399.

[4] 197 U. S. 11.

[5] This last sentence is quoted from the opinion in Crowley v. Christensen (137 U. S. 86), a case in which it was held that no one has an inherent right to sell intoxicating liquors at retail, and that such retail selling may be regulated or even wholly forbidden by the State.

[6] 274 U. S. 200.

[7] 262 U. S. 390.

English in any school, public or private, within the State, or the teaching of any language other than that of English in any class below the eighth grade. The law had been sought to be constitutionally defended as one to promote civic development by prohibiting training and education of the young in foreign tongues and ideals before they had learned English and acquired American ideals, and that it was a valid public policy that the English language should become the mother tongue of all the children reared in the State. To this the Supreme Court replied that the American people had always regarded education as a matter of supreme importance and that, included within the natural right of parents to control their children, was their right to give them an education suitable to their station in life; and also, that the calling or profession of teaching was regarded as a useful and honorable one, and indeed, essential to the public welfare.

The court called attention to the fact that, in the instant case, there was not called into question the right of States to control the instruction that should be given in the schools established and maintained by itself.

In Pierce v. Society of the Sisters[8] suit was brought by the defendants in error against the Governor of the State of Oregon to enjoin the enforcement of a State Compulsory Education Act which required every parent, guardian, or other person having control or charge of children between eight and sixteen years of age to send them to the public schools. The defendants in error who maintained private schools and had property devoted to that use, and from such schools derived a considerable income, declared, therefore, that, by the enforcement of the act, they would be substantially injured. Under authority of the doctrine declared in Meyer v. Nebraska the court held the act unconstitutional as an unreasonable interference with the liberty of parents and guardians to direct the upbringing and education of the children.

§ 839. Regulation of Labor Contracts.

Aside from limitations upon the right or power to enter into legally binding contracts due to status, as, for example, infancy, lunacy, etc., there are common-law limitations which exist with reference to contracts which are deemed to be opposed to public policy because regarded as immoral or as prejudicial to the public welfare. Instances of such contracts or agreements are those in restraint of trade or of competition or which tend to create monopolies, wagering or betting contracts, contracts in restraint or discouragement of marriage, agreements which amount to seditious or otherwise criminal conspiracies, agreements to interfere with or bring improper influences to bear upon the administration of justice by the courts, or to influence legislation (lobbying), etc. In some cases these contracts, and others of like nature, are held to be void or voidable; in other cases, the entering into them has been, or still is, held to constitute a criminal act. All such limitations upon contractual liberty are deemed constitutional either as common-law limitations, or, when imposed by statute, as proper police measures. During comparatively recent years, however, there has been much legislation, both State and Federal, which has sought to regulate the contracts between employers and employees as regards either the form or time of wage payments and as to their amount, and their constitutionality has been attacked upon the ground that they are in violation of the requirement with regard to due process of law. Because of its importance this subject will be specifically treated in the sections which follow.

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[8] 268 U. S. 510.

§ 840. Hours of Labor for Women.

The limitation by statute of the hours that one may labor, or contract to labor, so far as they relate to women and children, when reasonable in character, have been sustained as police measures for the protection of the health of the laborers, or, in the case of women, of their children also. This position was not reached, however, without some dissent upon the part of the courts. Thus, in 1895, in Ritchie v. Illinois[9] the court held unconstitutional a State law fixing an eight-hour labor day for women, upon the ground that it was a "purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties."

However, in Müller v. Oregon,[10] decided in 1908, the Supreme Court sustained a State law limiting the labor of women in laundries to ten hours a day, upon the ground (of which the court said that it was entitled to take judicial knowledge), that women's physical structure and the functions which she performs justify special legislative protection as against labor injurious to her health.[11]

In Ritchie v. Wayman,[12] decided in 1910, the Illinois court, which fifteen years before had held void the eight-hour law for women, upheld a ten-hour law for women, thus following the holding of the United States Supreme Court in Müller v. Oregon.

In Riley v. Massachusetts,[13] decided in 1914, the Supreme Court again upheld a State ten-hour law (or more than fifty-six hours a week) for women.

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[9] 155 Ill. 98.

[10] 208 U. S. 412.

[11] Prior to this the courts in several of the States had upheld statutes limiting the hours of labor of women.

[12] 244 Ill. 509.

[13] 232 U. S. 671.

From this time on there has been no doubt as to the constitutionality of statutes limiting, to a reasonable amount, the hours that women may work. The only question has been as to the matter of the laws' reasonableness. In Miller v. Wilson [14] a State law was upheld which limited the hours of labor of women in certain specified establishments to eight hours a day or forty-eight hours in one week. The court, however, said: "This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme." [15]

§ 841. Hours of Labor in Dangerous Employments.

It is established that the hours of labor, irrespective of age or sex, may be limited in dangerous employments, or under other circumstances, where it sufficiently appears that such limitation will tend to prevent accidents or sickness or undue physical exhaustion of the workers. The leading case upon this point is Holden v. Hardy.[16] In that case the court said: "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has adjudged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

§ 842. Hours of Labor of Adult Males.

It is established that, as regards laborers employed by itself or upon its own public works, the States or the National Government may regulate at will the hours of labor. In Atkin v. Kansas [17] this doctrine was declared. The court said: "Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours a day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them." [18]

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[14] 236 U. S. 373.

[15] See also Bosley v. McLaughlin (236 U. S. 385), decided at the same time.

[16] 169 U. S. 366.

[17] 191 U. S. 207, 222.

[18] In Heim v. McCall (239 U. S. 175) and Crane v. New York (239 U. S. 195) was further illustrated the extent of the power of a State or of the United States to regulate employment upon its own public works, it being held in these cases that a statute was constitutional which limited such employment to citizens of the United States, although, in Truax v. Raich (239 U. S. 33) it had been held that this restriction might not be imposed upon employers of labor upon private works.

Lochner v. New York [19] decided in 1905, is a leading case as to the right of a State to control adult male laborers in private employments. In that case was held invalid a State law which sought to limit to sixty hours a week and ten hours a day the labor of workmen in bakeries. The court was unable to find that the operation of bakeries was one which, because of its character, would justify such police control as had been found to exist in mining in Holden v. Hardy,[20] and, lacking this justification, deemed the restriction upon the power of the employers and employees to enter into labor contracts an arbitrary interference with their liberty and therefore a denial of due process of law.

This decision, since the time it was rendered, has given rise to much adverse comment. The criticism, however, has been not to the general doctrine declared but to the substitution by the Supreme Court of its judgment for that of the legislature of the State of New York that there were no elements present in the bakery business which would justify an exercise of the State's police power.

In Bunting v. Oregon,[21] the Supreme Court upheld a State law which provided that: "No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in cases of emergency, when life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage."

Here the court found no reason in the record for denying the contention that the law was intended as a police measure for the preservation or protection of the health of the employees, and that it would have that effect. The court also refused to accept the contention that, by providing for extra pay for overtime, the law was one for the fixing of wages.

§ 843. Minimum Wage Laws.

Although the economic expediency of fixing by law the minimum wages that may be legally paid to employees has been much disputed, such laws have been passed in a considerable number of States with respect to women and children or to specific employments which are peculiarly susceptible to "sweatshop" methods. Against the constitutionality of all such laws it has been urged that they do not seek, except remotely, any legitimate police end such as the protection of the health or morals of the employees, but rather that they aim to correct, from the standpoint of social justice, the distribution of economic goods which results from the operation of free competitive forces. In this respect, it has been urged, they are similar to laws which would attempt to fix or limit the prices at which commodities may be sold.

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[19] 198 U. S. 45.

[20] 169 U. S. 366.

[21] 243 U. S. 426.

In Stettler v. O'Hara [22] and Simpson v. O'Hara,[23] a State law was held constitutional by the Supreme Court of Oregon which was entitled "An Act to protect the lives and morals of women and minor workers, and to establish an industrial welfare commission and define its powers and duties, and to provide for the fixing of minimum wages and maximum hours and standard conditions of labor for such workers, and to provide penalties for the violation of this Act." In its preamble the law recited that the welfare of the State of Oregon required that women and children should be protected against conditions of labor which have a pernicious effect upon their health and morals, and that inadequate wages, as well as unduly long hours and unsanitary conditions of the establishments, have such a pernicious effect.

Upon appeal to the Supreme Court of the United States, this decision was affirmed by an evenly divided court, without opinion filed.[24] The case, therefore, furnished no authoritative guidance as to what would be the position of the court with regard to the constitutionality of minimum wage legislation. This statement of the court's position was, however, made in the case of Adkins v. Children's Hospital [25] in which the court declared invalid an act of Congress which authorized a commission, thereby created, to fix standards of minimum wages for women in any occupation in the District of Columbia, and to declare what wages should be deemed inadequate to supply the necessary cost of living to any such women in order to maintain them in good health and to protect their morals, and also to ascertain and declare standards of minimum wages for minors and what wages should be deemed unreasonably low for such minors. Violations by employers of the standards and wages thus declared were made misdemeanors punishable by fine and imprisonment.

Limitations upon the hours of employment, said the court, had never been sustained except in respect of those occupations where the work if long continued is detrimental to health, and therefore, the sustaining of such laws furnished no justification by way of analogy for sustaining the instant law in limitation of the wages to be paid or received. "It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree."

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[22] 69 Or. 519.

[23] 70 Or. 261.

[24] Stettler v. O'Hara (243 U. S. 629).

[25] 261 U. S. 525, 554.

Furthermore, as the court went on to point out, the standard furnished by the statute for the guidance of the board was so vague as to be impossible of practical application with any reasonable degree of accuracy. "What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so."

Also, said the court, the law took account of only one party to the contract. "It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden."

Reduced to its lowest and most precise terms, the decision turned upon the point whether or not there could be seen a direct relation between low wages of women and their health or morals. The Congress which enacted the law, and the dissenting justices, were convinced that there was such a relation. The majority of the court could perceive no such relation.

§ 844. Wages: Character, Methods and Times of Payment.

Under the police power, the government may regulate, in a reasonable manner, for purposes of protection against fraud, or for other public welfare ends, the character, methods and times of payment of wages. Thus, in McLean v. Arkansas [26] a State statute was sustained which required coal to be measured before screening for payment of miners' wages; in Knoxville Iron Co. v. Harbison,[27] a State law was sustained which required the redemption in cash of store orders issued in payment of wages; in Erie Railway Co. v. Williams,[28] a State statute was sustained which regulated the time within which wages should be paid to employees in certain specified industries.

§ 845. Laws Regulating the Employment and Discharge of Workmen.

In Coppage v. Kansas [29] the court held invalid a State law which forbade an employer to require of one seeking employment that he would not become or remain a member of a trade-union. Before this, in Adair v. United States,[30] it had held that Congress could not constitutionally forbid an interstate railroad from discharging an employee solely because of his affiliation with a trade-union. In these acts the court could find no considerations of public health, safety, morals, or general welfare, such as would justify them as police regulations.

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[26] 211 U. S. 539.

[27] 183 U. S. 13.

[28] 233 U. S. 685.

[29] 236 U. S. 1.

In Prudential Insurance Co. v. Cheek [31] the Supreme Court upheld as constitutional a State law which required corporations to issue to employees leaving their services, or being discharged from them after more than ninety days of service, a letter stating the character of the services rendered by such employees, the duration thereof, and the true causes of the termination thereof. The court pointed out that the law applied only to corporations, which, being creations of the law, are subject to such qualifications imposed by that law as may reasonably be deemed expedient in order that their activities may not operate to the detriment of the rights of others; and that, as to the requirement in question, it was one enforced by a custom that very generally existed irrespective of legal requirement. As to the inherent quality of the requirement the court said: "It does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon. So far as construed and applied in this case, it does not debar a corporation from dismissing an employee without cause, if such would be its right otherwise, nor from stating that he is dismissed without cause if such be the fact. It does not require that it give a commendatory letter. There is nothing to interfere, even indirectly, with the liberty of the corporation in dealing with its employee, beyond giving him, instead of what formerly was called a 'reference' or 'character,' a brief statement of his service with the company according to the truth, a word of introduction, to be his credentials, where otherwise the opportunity of future employment easily might be barred or impeded."

§ 846. Wages Contract.

In McLean v. Arkansas,[32] the court upheld a law preventing miners from contracting for wages upon a basis of screened coal instead of the gross weight mined. The court, in its opinion, said: "We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state."

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[30] 208 U. S. 161.

[31] 259 U. S. 530, 537.

[32] 211 U. S. 539, 550.

In German Alliance Ins. Co. v. Hale,[33] a State law was held to be a valid police regulation which provided that the insured might recover, in addition to the actual loss, twenty-five per cent thereof, any stipulation in the contract of insurance to the contrary notwithstanding, from any company connected with a tariff association which fixed rates of insurance.

Still more important, however, was the case of C., B. & Q. R. R. Co. v. McGuire,[34] decided a month later, in which (after a review of the cases construing the freedom of contract as protected by the due process of law requirement) the court upheld a law defining the liability of railway corporations for injuries resulting from negligence and mismanagement in the operation of their trains, and precluding the companies from setting up as a defence the acceptance by the injured of benefits under a contract of membership in their relief departments.

In Mutual Loan Co. v. Martell,[35] a State law was upheld which declared invalid, as against the employer, assignments of, or orders for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by a written consent of the wife of the employee.

In Knoxville Iron Co. v. Harbison [36] the court approved a law compelling the cashing by the employer of coal orders when presented by the miner.

The Adamson Act of 1916 [37] despite its title as one in regulation of the hours of labor, was, in fact, one in regulation of the wages to be paid. The constitutionality of the measure turned not so much upon its police character as upon the special emergency it was intended to meet and the fact that it related to interstate commerce, the regulation of which is expressly placed within the power of Congress. This act is discussed in some detail in another place.[38]

§ 847. Employers' Liability and Workmen's Compensation Acts.

An adequate discussion of the constitutional difficulties which have beset the Federal Government and the States in their attempts to change the doctrines of the common law with reference to the liability of employers for accidents received by their employees in the course of their employment is one for which space cannot be spared in the present volume.[39] Here all that can be done will be to state the conclusions which have been reached.

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[33] 219 U. S. 307.

[34] 219 U. S. 549.

[35] 222 U. S. 225.

[36] 183 U. S. 13.

[37] 39 Stat. at L. 721.

[38] See § 483.

[39] Such a discussion the author has attempted in Chapters XCVII and XCVIII (vol. III) of his larger work, *The Constitutional Law of the United States*.

In Ives v. South Buffalo Ry. Company,[40] a case which gave rise at the time to a great amount of controversy and comment, the Court of Appeals of New York held invalid the Workman's Compensation Act of that State, enacted June 25, 1910, upon the ground, *inter alia*, that, if enforced, it would operate to deprive employers of property without due process of law in violation both of the Fourteenth Amendment of the Federal Constitution, and of the Constitution of the State. In substance this law, compulsory in character, imposed an absolute liability in specific amounts on employers of workmen engaged in certain enumerated occupations, for injuries sustained by them in the course of their employment, and in whole or part contributed to by a necessary risk or danger of the employment or one inherent in the nature thereof, provided the injury was not due in whole or part to the "serious and wilful misconduct" of the workmen injured. The common-law and statutory rights to bring action could, however, be elected by the employee.

The Court of Appeals in its opinion admitted the constitutionality of laws modifying or abolishing the various defences to these various common-law actions—assumption of risk, contributory negligence, and fellow-servant doctrine—but found in the law an attempt to go far beyond this and impose upon employers an absolute liability when there had been no fault upon their part.

It was pointed out by the court that the occupations enumerated by the act were concededly lawful occupations, and, therefore, that the special and absolute liabilities attached by the law to their carrying on might not be justified unless their imposition could be brought under the police power of the State. This, the court held, it was impossible to do.

In order to overcome the doctrine of the Ives v. South Buffalo case, so far as its own constitutional law was concerned, the State of New York, in 1914, adopted a constitutional Amendment, and, under authorization of that amendment a law was passed by the legislature of New York and its constituionality sustained by the New York courts.[41] In White v. New York Central R. Co. [42] the law was again sustained, and upon writ of error reached the Supreme Court of the United States in order to determine whether the act satisfied that court's judgment as to the requirements of the Federal Constitution with regard to due process of law.[43] Thus, for the first time, the Supreme Court was called upon to pass upon the constitutionality, as tested by the due process of law provision of the Fourteenth Amendment, of an Employers' Liability and Workmens' Compensation Act. The court held the act valid.

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[40] 201 N. Y. 271. For other decisions of State courts dealing with employers' liability and workmen's compensation acts, see opinion of the Supreme Judicial Court of Massachusetts. (96 N. E. Rep. 308); State *ex rel.* Davis-Smith Co. v. Clausen (65 Wash. 156); Borgnis v. The Falk Co. (133 N. W. Rep. 209); Cunningham v. Northwestern Imp. Co. (119 Pac. Rep. 554); State *ex rel.* Yaple v. Creamer (69 N. E. 602).

[41] Jensen v. Southern Pac. R. Co. (215 N. Y. 514).

[42] 216 N. Y. 653.

The law involved in this case, in lieu of the common-law liability confined to cases of negligence, imposed a liability upon employers to make compensation to their employees for disabling or fatal accidental personal injuries received by them in the course of their employment in certain occupations declared to be "hazardous" in character, without regard to whether or not there might have been contributory negligence upon the part of the injured employees, but only in cases where there had not been a wilful intent upon the part of such employees to produce such accidents, or where the injury had not resulted solely from or because of their being intoxicated. The compensation to be paid was to be according to a scale prescribed in the act and based upon loss of earning power, regard in this respect being had to wages previously received and the character and duration of the disability, and, in cases of death, according to the dependency of the surviving wife, husband or infant children.

In Hawkins v. Bleakly [44] a Workmen's Compensation Act of the State of Iowa was held not to offend against the constitutional requirement of due process of law which gave to the employer the right to reject the law's compensation features but provided that, if he did so, he could not escape from liability in damages for personal injuries received by his employees in the usual course of their employment on the ground that the employee assumed the risk of his employment, or because of the employee's negligence, unless this was wilful and with intent to cause the injury or the injury was the result of intoxication of the injured one, or because the injury had been due to the negligence of a coemployee. It was also provided by the act that, in an action for damages, the injury was to be presumed to have been due to the negligence of the employer, upon whom should lie the burden of proof of disproving this presumption. This feature of the law, the court also found unobjectionable.

In Mountain Timber Co. v. Washington [45] a workmen's compensation act of the State of Washington was upheld which, as distinguished from the New York and Iowa acts, divided the industries of the State into two classes according to their conceived degrees of hazardousness to their employees, and, furthermore, provided that every employer in each class should contribute certain scheduled amounts to a public fund out of which compensation should be paid to employees injured in the course of employment in the industries of the class. Each general group or class of the industries of the State was thus to be liable for all the injuries to workmen in that class. This special feature of the law was sustained upon the ground that the assessments upon the employers were in the nature of a tax for promoting the general interest of the group paying it, the scheme being in some sense one of insurance and in some sense one of pensioning. The authority relied upon as to this was Noble State Bank v. Haskell.[46]

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[43] New York Central R. Co. v. White (243 U. S. 188).

[44] 243 U. S. 210.

[45] 243 U. S. 219.

In Arizona Copper Co. v. Hammer [47] a State workmen's compensation law was upheld which gave to the injured employee in certain specified hazardous occupations three alternatives; either to sue under the common law freed from the fellow-servant defence, and leaving the defences of contributory negligence and assumption of risk to the jury; or to obtain relief under the Employers' Liability Law which applied to hazardous occupations where the injury or death was not due to the plaintiff's own negligence; or to rely upon the Compulsory Compensation Law which was applicable to especially dangerous occupations, and under which he could recover irrespective of fault on the part of the employer.[48]

As regards what may be considered a hazardous employment and as to accidents due to hazards inherent in the employment, an interesting case is that of Ward v. Krinsky.[49] In this case was upheld a New York law which added to the employments covered by the existing Workmen's Compensation Law a new group consisting of "all other employments not hereinbefore enumerated, carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant, or away from the plant of the employer under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

The provision was held not to deny equal protection of the laws because of the exclusion of farm laborers and domestic servants, the classification being declared a reasonable one. Also the law was upheld as applied to an accident which, while suffered in the course of the employment, had not been due to any hazard typical of the employment. The court admitted that it would not be conclusively bound by a legislative declaration as to what occupations were to be deemed hazardous, but the instant case showed how far the court would go in accepting as reasonable the legislative declaration.

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[46] 219 U. S. 104.

[47] 250 U. S. 400.

[48] Four justices dissented on the ground that the Arizona law in the instant case was distinguishable from the laws which had been previously sustained in that the employer was not exempted from any liability formerly imposed, and thus was given no *quid pro quo* for the new burdens imposed upon him. In other words, that the common-law rules were set aside without a reasonably just substitute for them being provided. Also, that the ordinary risks of the occupation were imposed upon the employers without defined limit, and that, thus, compensation might have to be paid to the injured or killed employee not only for loss of earning power but for physical suffering and mental pain.

[49] 259 U. S. 503.

As yet, then, the Supreme Court has upheld Workmen's Compensation Acts only as applied to hazardous occupations, but it has accepted such broad legislative declarations as to what occupations are to be deemed hazardous in character that it is difficult to say of what occupations this character may not be predicated.

In Sheehan Co. v. Shuler [50] and New York State Railways Co. v. Shuler,[51] laws were held constitutional which required employers to pay money into State funds for the vocational rehabilitation of injured employees in addition to the sums payable for compensation for the accidents.

In a number of States statutes, similar to those relating to accidents, have been passed providing for compensation to workmen for diseases incurred by them arising out of the character of the employments engaged in by them. Though the constitutionality of none of these laws has been tested before the Supreme Court, it may be safely said that they will be judged upon the same basis as the Compensation Acts relating to accidents. In some cases, indeed, the State courts have treated the acquiring of these diseases as "accidents" incurred in the course of employment. In other cases the statutes have themselves so directed.

§ 848. Compulsory Insurance by Automobilists.

There has been considerable agitation for the enactment of laws of various kinds compelling owners or operators of automobiles on the public roads to take out compensation as distinguished from liability insurance against accidents to other persons or property. If such legislation is secured its constitutionality will undoubtedly be judged in accordance with the principles which have been applied to Employers' Liability and Workmen's Compensation Laws. In some States there are already laws requiring motor busses and taxicabs operating on city streets and roads to carry liability insurance, and the constitutionality of these laws as applied to city streets has been sustained by the Supreme Court in Packard v. Banton.[52] To the contention in this case that vehicles operated for revenue were discriminated against as contrasted with those operated for private ends the court said: "If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature deems proper."

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[50] 265 U. S. 371.

[51] 265 U. S. 379.

[52] 264 U. S. 140.

§ 849. Due Process and Eminent Domain.

It is established that taking private property for public use is not *per se* a taking without due process any more than is an exercise of the taxing power. It only becomes such when proper procedural methods are not provided, or when the taking is not for a public use, or, in the case of eminent domain, when adequate compensation is not made.

In Bangor & P. R. Co. v. McComb [53] the court said: "As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate."

A somewhat different phase of the question as to what constitutes a public purpose or use is presented when, by an exercise of the police power, or of eminent domain, or of both, private property is authorized to be taken or employed by private persons for their own individual gain or for uses to which the public is not admitted. Here, the actual use not being public, the justifying public interest has to be deduced from the special character of the private use which is authorized. Thus, in Hagar v. Reclamation District [54] the court upheld a State law which provided for the creation of reclamation districts which were authorized to construct drainage canals for the drainage of marshes, and to charge the costs to the parties specially benefited. This was justified by the court upon the ground that the real and substantial purpose of the law was to benefit the health and prosperity of the community, and, therefore, a legitimate exercise of the State's police power.

In Head v. Amoskeag Manufacturing Co.[55] a State law was upheld which authorized individuals to erect, and maintain on their land, water mills and dams across non-navigable streams, upon compensation being made to owners of land injured by being flooded thereby.

In Fallbrook Irrigation District v. Bradley [56] was sustained an act of California which provided for the organization of irrigation "districts" which were given authority to enter upon lands, to acquire by purchase or condemnation the lands needed for the construction of irrigation works, canals, etc., to acquire canals and other private irrigation works already in existence, to issue bonds for the expenses thus incurred, and to assess all benefited property for their payment.

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[53] 60 Me. 290.

[54] 111 U. S. 701.

[55] 113 U. S. 9.

[56] 164 U. S. 112.

In Strickley v. Highland Boy Gold Mining Company [57] a private corporation was permitted to obtain a right of way across private property for an aërial bucket line. This case, in turn, relied upon Clark v. Nash [58] in which was upheld a statute permitting a private party to condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch in order to obtain water from a stream in which he had an interest.

In Otis v. Ludlow Manufacturing Co.[59] the court held that, under the local and peculiar conditions prevailing in Massachusetts, the State had a power to authorize individual millowners to obtain necessary water power for their mills by erecting dams, even though upper lands were thereby flooded, due compensation being made to the owners of such lands for the damage done. In other words, relying upon Clark v. Nash and Strickley v. Highland Boy Gold Mining Company, it was declared that the peculiar physical conditions and the requirements of water power made it a matter of public, as distinguished from a private, interest that private millowners should be enabled to obtain the necessary water power.

In Offield v. N. Y., N. H. & H. Ry. Co. [60] the court upheld a law of Connecticut providing that where a railroad company is the lessee of another railway company and the owner of three-fourths of its stock, it may obtain, by condemnation proceedings if necessary, the remaining outstanding shares. It was declared that the public had an interest in the development of the road so that it might best serve the public and that, therefore, the condemnation was for a public use.

State of Georgia v. City of Chattanooga [61] is authority for the proposition that a State may exercise its sovereign right of eminent domain with reference to lands within its borders which are owned by another State. In this case the court said: "The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister State owns the land for railroad purposes. Having acquired land in another State for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect to its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings."

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[57] 200 U. S. 527.

[58] 198 U. S. 361.

[59] 201 U. S. 140.

[60] 203 U. S. 372.

[61] 264 U. S. 472, 479.

The right of eminent domain may not be contracted away or surrendered in any other manner.[62]

§ 850. Due Process and the Specifically Granted Powers of Congress.

The requirement of due process of law imposed by the Fifth Amendment upon the United States is, in its application to the legislative powers of Congress, governed by the fact that the powers are expressly given to that body and, except as expressly qualified or limited by other provisions of the Constitution, are to be construed as plenary in character. This fact is of great importance for the reason that the principle is well established that, where a plenary regulative or controlling power is granted by the Constitution to a legislative body, there is authorized an incidental interference with private rights which may result from the rules and regulations which, in the exercise of that power, the legislature may see fit to establish. This principle follows from the fact that the power being constitutionally granted there can, of course, be no claim that, when exercised, the legislature is exceeding its powers. This does not mean, however, that the requirement of due process of law is to have no application. Upon the procedural side it has full application. No one can be held civilly or criminally responsible under the legislatively created rules and regulations except in proceedings which satisfy the procedural requirements of due process of law. Furthermore, upon its substantive side, due process of law operates as a limitation through the application of the rule that the legislative power which is granted is one which must be reasonably and not arbitrarily exercised. But it still remains true that the grant of constitutional power opens up the subject to legislative regulation, and that, therefore, no claim can be made that the subject itself, as one involving private rights, is exempt from legislative regulation. However, the power to regulate, even though plenary, does not carry with it a right, under its guise, to enact legislation, the direct and primary purpose of which is to impair or destroy private, personal or property rights. And in general it is, of course, true that not every law, in form, or by legislative avowal declared to be, an exercise of a granted regulative power, is necessarily to be held to be such.

In Knox v. Lee (Legal Tender Cases),[63] the court, referring to the provision of the Fifth Amendment with reference to due process, said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.

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[62] Pennsylvania Hospital v. Philadelphia (245 U. S. 20); Galveston Wharf Co. v. Galveston (260 U. S. 473).

[63] 12 Wall. 457, 681.

A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed or a non-intercourse act or an embargo be enacted, or a war be declared?"

The application of the doctrine that, although an incidental interference with private rights does not render unconstitutional a regulation prescribed by Congress in exercise of its constitutional powers, a direct impairment or destruction of these rights, though clothed in the form of regulations issued in exercise of such powers, is unconstitutional, as a denial of due process of law, has received especial discussion in connection with the various acts of Congress in regulation of interstate and foreign commerce. This phase of the subject cannot be here discussed, but, as to it, the author refers to the treatment of it, in considerable detail, in his larger work *The Constitutional Law of the United States*.[64]

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[64] Volume III, Chapter CI.

CHAPTER LXXXIV

DUE PROCESS OF LAW AND STATE TAXATION

The taxing powers of the States of the Union are without limits save those which are imposed by their own Constitutions or by the Federal Constitution. The restraints imposed by the State Constitutions necessarily vary in the different States and will not be considered in this treatise since they fall outside the sphere of Federal constitutional law.

Some of the limitations upon the taxing powers of the State imposed by the Federal Constitution are express; others are implied. Most of the implied limitations are dealt with in other chapters in which are discussed the express constitutional provisions which, by implication, place restraints upon the States with reference to their powers to tax.

The express limitations laid upon the States' taxing powers with reference to imposts and duties on imports or exports and to tonnage duties have been dealt with in connection with the discussion of Interstate and Foreign Commerce.

There remains, then, to be considered in the present and following chapters the limitations upon the States' taxing powers arising from the equal protection of the laws and due process of law clauses of the Fourteenth Amendment and, possibly distinguishable from the requirement of this latter clause, the limitations arising from the fact that the jurisdictional authority of the States is strictly confined to their own several areas, in this respect differing from wholly sovereign States.[1]

§ 851. Due Process of Law and Taxation.

In Davidson v. New Orleans [2] the Supreme Court, after considering the meaning of the phrase "due process of law" as employed in the Fourteenth Amendment, and after adverting to the difficulty of stating affirmatively and completely the protection afforded by it, went on to say that they could at least state some of the cases which do not fall within its application, and among these, they said, "we lay down the following proposition as applicable to the case before us: that whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard."

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[1] *Cf.* Willoughby, *Fundamental Concepts of Public Law*, Chapter XXIV.

[2] 96 U. S. 97. This case was with reference to the taxing powers of the States, but the doctrines laid down apply equally to the taxing powers of the Federal Government.

From the foregoing it is apparent that the taking of private property in the form of taxes is not, in itself, a taking of private property without due process of law because no direct compensation is made for the property thus taken. Though the taking of the property in the form of a tax is thus not in itself a taking without due process, it may become such by reason of the purpose for which, or the manner in which, the tax is levied, assessed and collected.

Due process of law obliges the United States as well as the individual States, in the exercise of their taxing powers, to conform to the following rules:

1. That the tax shall be for a public purpose.
2. That it shall operate uniformly upon those subject to it.
3. That either the person or the property taxed shall be within the jurisdiction of the government levying the tax.
4. That, in the assessment and collection of the tax, certain guarantees against injustice to individuals, especially in the case of specific as distinguished from *ad valorem* taxes, by way of notice and opportunity for a hearing, shall be provided.

§ 852. Taxation Must Be for a Public Purpose.

A tax being in the eyes of the law an enforced contribution upon persons or property to raise money for a public purpose, it follows that where this public purpose is absent, the contribution sought to be enforced cannot be justified as a tax but amounts to an attempt to take property without due process of law. The validity of this proposition is beyond dispute, but judicial records furnish comparatively few instances of tax levies being held void for this reason. This is due, in the first place, to the fact that not often do the laws expressly state the purpose for which a tax is levied; and, in the second place, where this purpose is stated, the courts will, in deference to the legislative judgment, construe the purpose to be a public one if it is possible to do so. In Brodhead v. City of Milwaukee [3] the Supreme Court of Wisconsin said: "To justify the court in arresting the proceedings and declaring the tax void the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable to every mind at the first blush."

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[3] 19 Wis. 624.

In Loan Association v. Topeka [4] the court seemed to deduce the constitutional invalidity of laws levying taxes for private purposes from an assumed inherent limitation upon legislative power in "free governments," such as that of the United States, rather than from the specific provisions in the Federal Constitution with regard to due process of law.

It is certain that, at the present time, no such argument would be made in order to invalidate a tax levied for a private purpose, but that, instead, the invalidating source would be found in the due process of law provisions of the Federal and State Constitutions. It is to be observed that at the time the Loan Association case was decided—in 1874—the possibilities inherent in the constitutional requirement regarding due process of law had not been perceived by the courts. Even Justice Clifford, who perceived the impropriety upon the part of the courts of nullifying a law "on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction," and who therefore dissented from the judgment in the case, did not consider whether such a restriction might not be found in the due process clause of the Fourteenth Amendment.

That a tax levied specifically for an other than public purpose is unconstitutional as providing for a taking of the property of those taxed without due process of law is fully established. Thus, we find the court saying, in Jones v. Portland,[5] decided in 1917: "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State." [6]

§ 853. Taxation and the Procedural Requirements of Due Process of Law.

With reference to all forms of taxation it is necessary that the procedural requirements of due process be satisfied. This has never been doubted. Stating affirmatively these requirements, the court, in Davidson v. New Orleans [7] said: "Whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or of contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

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[4] 20 Wall. 655.

[5] 245 U. S. 217.

[6] See also, Green v. Fazier (253 U. S. 233).

[7] 96 U. S. 97.

§ 854. Notice and Opportunity to Contest.

Due process of law requires that in the case of an *ad valorem* tax an opportunity shall be given the taxpayer to appear and give evidence as to the proper valuation of the property which is assessed.[8] In other cases, however, no notice or opportunity for hearing need be given the taxpayer.

§ 855. Hearing before Administrative Tribunal Sufficient.

It is not necessary that the hearing thus required in the case of *ad valorem* taxes should be before a court of justice. The hearing may be had, and, in fact, is usually had, before an administrative board whose action in this respect is judicial in character and whose determinations may be final and conclusive in the matter. Thus, for example, by Section 2930 of the Revised Statutes, it is provided that in the matter of appraisement of imports an appeal shall be allowed the importer from the collector of customs to "one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants," but that "if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly." Provision is, however, made for relief in cases where the collectors have acted fraudulently or upon a principle not sanctioned by law, or where they have in any way transcended the powers given them by Congress.[9]

§ 856. Character of Hearing Required in Taxation Proceedings.

In McMillen v. Anderson [10] it was held that due process does not demand that a person shall be given an opportunity to be personally present when a tax is assessed against him. And in Bell's Gap R. R. Co. v. Pennsylvania [11] it was pointed out that in the collection of taxes there is not required that there should be the same sort of notice as is demanded in suits at law, or even such as are deemed necessary in the exercise of the power of eminent domain. "It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." And in Turpin v. Lemon [12] the court said: "Laws for the assessment and collection of general taxes stand upon a somewhat different footing [from those governing the exercise of the power of eminent domain], and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary."

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[8] Or, if it be a special assessment for the purpose of some public improvement, as to whether the property in question is properly included within the assessment.

[9] As to the constitutionality of these provisions, see Hilton v. Merritt (110 U. S. 97).

[10] 95 U. S. 37.

[11] 134 U. S. 232.

The matter of the notice required in the case of "special assessment" is considered in a later section.

§ 857. Summary Modes of Collection.

For the collection of taxes, as well as for the appraisement of property for taxation, summary modes of procedure may be used, the justification for this being that, without such means, no government could exist. Hence it has been held that, when a tax is assessed and collected according to customary modes and usages, or in subordination to the principles underlying them, the requirements of due process are satisfied. "This must be so," the court said in King v. Mullins,[13] "else the existence of government might be put in peril by the delays attending upon formal judicial proceedings for the collection of taxes."

§ 858. Injunctions and State Taxes.

In some, but not all, of the States it is provided by statute, as is the case with the Federal Government, that injunctions shall not issue restraining the collection of taxes. In cases coming to them from those States in which the use of injunctions for this purpose is permitted, the Federal courts have held, in accordance with the general principles of equity, that they will not enjoin the collection of State taxes when a plain and adequate remedy at law has been given to recover back taxes illegally collected, and the attack upon the assessment is based solely on the ground that it is illegal and void.[14]

§ 859. Special Assessments.

The taking by the State of private property in the form of taxes is held to be justified and not a taking of property for a public use without compensation, upon the theory that compensation is returned in the form of police protection and of other benefits flowing from the existence of the government. A logical extension of this justification permits the State to levy special taxes upon land embraced within a given district where the proceeds of such taxes are to be spent for improvements which, though of general public utility, are yet for the special and peculiar benefit of that district. For, as the court said in Lockwood v. St. Louis,[15] "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few. . . . General taxation for a mere local purpose is unjust; it burdens those who are not benefited and benefits those who are exempt from the burden."

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[12] 187 U. S. 51.

[13] 171 U. S. 404. See also, State Railroad Tax Cases (92 U. S. 575); Cheatham v. United States (92 U. S. 85).

For other cases dealing with the necessity and constitutional propriety of summary proceedings for the levying and collection of taxes, see Leigh v. Green (193 U. S. 79); Ballard v. Hunter (204 U. S. 241); Kentucky Union Co. v. Kentucky (219 U. S. 140).

[14] Singer Sewing Machine Co. v. Benedict (229 U. S. 481).

In similarity to this principle that the property peculiarly benefited by a public improvement may be called upon, by a special assessment, to bear the cost thereof, is the principle that, in assessing the damages, when private property is taken for a public purpose under an exercise of the right of eminent domain, the resulting benefits to the owner from the public use to which his appropriated property is devoted may be subtracted from the value of the property taken. This right thus to set off benefits was denied by the Court of Appeals of the District of Columbia in several cases, but the Supreme Court of the United States, in Bauman v. Ross [16] emphatically repudiated the doctrine.

§ 860. Taxes and Special Assessments Distinguished.

Special assessments are, properly speaking, taxes, and yet they are of so peculiar a character that the courts have not infrequently refused to bring them within the meaning of the term "tax." Thus where certain corporations or pieces of property have been by law exempted from taxation, they have, nevertheless, been held subject to special assessments.[17] Again, where State Constitutions have provided that taxation shall be equal and uniform, or that all property shall be taxed according to its value, the courts have nevertheless held that special assessments for local improvements may be levied and assessed according to the front-foot rule or by a standard other than that of value.[18]

§ 861. Constitutional Requirements of Special Assessments.

The power of the legislature to establish special taxing districts upon the lands within which a special tax is to be levied, assessed, and collected is limited by the following rules: (1) There must be some reasonable ground for grouping into a single district the lands composing it, and this reasonable ground must, as has been seen, be that the lands in question will derive special benefit from the public improvement to meet the expenses of which the tax is levied. It is, however, to be observed that the legislature has a very broad discretion as to the limits of the areas selected for special assessment purposes. (2) The tax so levied must be assessed according to a rule uniformly applied throughout the district, which, in its actual operation, will fairly distribute the tax among the several pieces of property affected according to the benefits received or to be received from the public improvement which is undertaken. Whether or not the assessments may be in excess of the benefits is a question to be presently considered, but in any case they must be apportioned generally according to the benefits. By this is not meant that this apportionment must be absolutely exact. This, in most cases, is an impossibility. But, generally speaking, the part of the entire tax borne by each piece of land must agree with the part of the entire benefit received.[19]

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[15] 24 Mo. 20.

[16] 167 U. S. 548.

[17] Lefevre v. Detroit (2 Mich. 586); Ill. Cent. R. Co. v. Decatur (126 Ill. 92). See *Mich. Law Review*, II, 455.

[18] As to the distinctions between taxes and special assessments, see Macon v. Patty (57 Miss. 378). As to the doctrine that a non-resident cannot be made personally liable for a special assessment levied upon land in the State owned by him, see Dewey v. Des Moines (173 U. S. 193).

§ 862. Resort to Special Assessments Discretionary with the Legislature.

When a public improvement is to be undertaken which will result in special benefit to a particular district, it is not obligatory upon the legislature to levy a special assessment upon that district for the purpose. Whether or not it will do so lies within its free discretion. Also the fact that the proposed improvement will be, to a certain extent, of general benefit to the whole community, does not render invalid a special assessment upon the district specially benefited.[20]

§ 863. Special Assessments in Excess of Benefits.

It has been seen that the justification for a special assessment is the special benefits received. Logically and justly, it would seem, therefore, that such special assessments should in no case be permitted to exceed, to any substantial extent at least, the benefits which justify them. In fact, however, the rule for a considerable number of years appeared to be that, so long as assessments are apportioned according to benefits, they are not necessarily measured in absolute amount by such benefits. Thus, for example, in Bauman v. Ross, cited above, in which was involved a law which provided that one-half of the amount measured as damages for the taking of the lands needed for the improvement contemplated should be assessed upon the lands benefited, no proviso appeared to meet cases in which the assessments thus provided for might exceed the benefits conferred; yet the court declared: "This fixing of the gross sum to be assessed was within the authority of Congress."

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[19] See especially Union Refrigerator Transit Co. v. Kentucky (199 U. S. 194).

[20] Bauman v. Ross (167 U. S. 548).

In Norwood v. Baker,[21] decided in 1898, it seemed as though a doctrine different from that stated above was to be developed. By later cases, however, this case was so explained and its doctrine modified as to make it appear that the present doctrine is that, while the assessment will be sustained if the chance is that the loss to an individual will exceed the benefit to him will not be great, or if the probable excess of cost to him will not be considerable.[22]

§ 864. Notice in Special Assessments.

The doctrine would seem to be well established that notice is not required to be given to owners of property subjected to special assessment when the legislature itself fixes assessment, the districts upon which it is to be levied, and the mode of apportionment; but that it is otherwise when these determinations have been delegated by the legislature to some subordinate body.[23] In the cited case the court declared with reference to assessments levied by subordinate bodies: "Due process of law requires that, at some stage of the proceeding, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

A comparatively recent case upon the foregoing points is that of Browning v. Hooper,[24] decided in 1926, and sometimes spoken of as the Archer County case.

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[21] 172 U. S. 269.

[22] As to the doctrine of Norwood v. Baker and the later cases, explaining and modifying that case, see the author's *The Constitutional Law of the United States*, vol. III, §§ 1243–1245.

[23] Londoner v. Denver (210 U. S. 373).

[24] 269 U. S. 396.

CHAPTER LXXXV

DUE PROCESS OF LAW AND JURISDICTION TO TAX

§ 865. Territorial Sovereignty.

With regard to the jurisdiction to tax a fundamental distinction exists between the powers of the United States and those of its constituent States. This distinction arises from the fact that the United States, in its dealings with other States, appears as an independent and sovereign body, whereas the individual States of the Union have a political status only as members of the Union and possess no powers of legal action outside their respective territorial limits. It thus results that, in many jurisdictional respects, including that of taxation, the United States can take action with regard to persons or property outside the territorial limits of the United States which the individual States of the Union may not take outside their respective limits.[1]

Of the complete jurisdiction of a sovereign State over all property within its territorial limits, whether for purposes of taxation, of eminent domain, or the regulation of its use in private hands, there is no dispute. Controversies as to jurisdiction, therefore, seldom if ever arise with regard to corporeal things. It is only with reference to incorporeal hereditaments or intangible personalty that questions as to situs for purpose of legal regulation or control occur.

Many of these questions are solved by applying the principle that *mobilia sequunter personam*, but no State permits this general doctrine or fiction to defeat its jurisdiction if there are any substantial grounds for holding that the personalty or incorporeal hereditament has a situs within its borders independently of the place of residence or domicile of its owner. Thus, sovereign States have not hesitated, under certain circumstances, to exercise jurisdiction over intangible personalty, even when owned by non-resident aliens, when the evidences of ownership—the bonds, promissory writings, mortgage instruments, or other evidences of credits—are, in fact, situated within their respective limits. In other cases, as will presently be seen, States base their rights of legal control, especially for purposes of taxation, upon the fact that the credits taxed are in the form of profits arising out of corporate or other business undertakings carried on within its borders, or that the mortgages or other liens are upon property similarly situated.

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[1] Generally as to the jurisdictional rights of sovereign States see the author's *Fundamental Concepts of Public Law.* (The Macmillan Co., 1924.) Several of the paragraphs which follow are taken, in substance, from that work. See also Chapter XLII of the present work entitled "Limitations upon the Federal Taxing Power."

The States of the American Union as between themselves, are foreign governments and their jurisdictions are strictly territorial in character, and, therefore, as between themselves, the Supreme Court applies the principles of public law that govern the relations of sovereign States to one another.

Because of the non-sovereign status of the States, and the fact that they have no dealings, as independent political persons, with foreign States, they are wholly incapacitated from exercising jurisdiction over their own citizens who have obtained a foreign domicile. Thus, while it is a generally accepted principle of public law that a sovereign State may assert whatever jurisdiction it pleases over its own citizens wherever they may be, holding them responsible in its courts for breaches of its own laws both civilly and criminally, for acts committed by them while in foreign countries, the same is not true of the member States of the American Union. They can take no cognizance of acts committed outside their own territorial limits upon the ground that the accused or tort feasors are their own citizens. And, of course, these States have no jurisdiction upon the high seas such as sovereign States possess. Furthermore, as a matter of express provision of the Federal Constitution, each of them is compelled to give full faith and credit to the public acts, records and judicial proceedings of the other States of the Union—an obligation which, as between sovereign States, is voluntary in character and discretionary in extent.

In the case of United States v. Bennett,[2] decided in 1914, the Supreme Court, dwelling upon the principles to be applied in determining the jurisdictional powers of the individual States as distinct from those applicable in the case of the Union, pointed out that while the attempt of one of these States to tax property outside its territorial limits would be in violation of the provision of the Federal Constitution which prohibits it from taking property without due process of law, the same was not true of the United States itself. The court said: "The application to the States of the rule of due process relied upon [by counsel in the case] comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State [of the Union] to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing powers is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution, and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. . . . Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority, and thus destroying the rights of other States [of the Union], and at the same time saving their rights from destruction by the other States, in other words, of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that Government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

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[2] 232 U. S. 299, 306.

The decision of the Supreme Court in the case known by the descriptive title "State Tax on Foreign-Held Bonds," [3] decided in 1873, has been one of the most discussed of the decisions of that court, and the doctrine therein declared, if not repudiated by later decisions, has at least been held down to practically the precise point then decided, namely, that bonds are property in the hands of their holders, and that, when these holders are non-residents of the State in which the company issuing them is incorporated or doing business, they are beyond the jurisdiction of that State.

With regard to the general powers of taxation which a State possesses, Justice Field, rendering the opinion for a unanimous court, said: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. . . . Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." [4]

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[3] Cleveland, etc., R. R. Co. v. Pennsylvania (15 Wall. 300, 319, 320).

[4] As to the situs of the property involved in this case, the court said: "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the credi-

In this Foreign-Held Bonds case the State law was held invalid because, as applied to the bonds, it was in violation of the provision of the Federal Constitution that no State of the Union shall pass a law impairing the obligation of contracts.[5] The obligation impaired was that between the corporations which were ordered to pay the tax and their non-resident bondholders.

In Hayes v. Pacific Steamship Co.,[6] it was held that a State might not tax as property a ship of a foreign registry which was only temporarily in a port of the State—which was, as it were, *in transitu*. Substantially the same was held in Morgan v. Parham.[7] So, also, in St. Louis v. Wiggins Ferry Co.,[8] it was held that the State of Missouri could not tax ferry-boats belonging to an Illinois company which boats were laid up on the Illinois shore when not in use.

In Ogden v. Saunders,[9] the Supreme Court held that a State of the Union could not give an extraterritorial effect to its insolvency laws.

In the immediately foregoing cases the Supreme Court of the United States held the State laws invalid simply as *ultra vires* from the standpoint of territorial jurisdiction, and without reference to any specific inhibition laid upon the States by the Federal Constitution. However, in the later cases of Louisville, etc., Ferry Co. v. Kentucky,[10] decided in 1903, and Delaware, L. & W. R. R. Co. v. Pennsylvania,[11] decided in 1905, the Federal Supreme Court declared that an attempt of a State to tax property which did not have its situs within the State was in violation of the express prohibition laid upon the States by the Federal Constitution that they should deprive no person of property without due process of law.[12]

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tors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

In other cases the Supreme Court of the United States has held that the right of a foreign corporation or non-resident to do business within a State may be subjected to what is in the nature of a license or excise tax. It has also been held that where foreign-held evidences of ownership or of credits are placed in the hands of resident agents for the purpose of collecting the interests, rents, etc., and of reinvesting the proceeds, they are to be deemed to have their situs within the State and therefore taxable by the State.

[5] Article I, Section 10.

[6] 17 How. 596.

[7] 16 Wall. 471.

[8] 11 Wall. 423.

[9] 12 Wh. 213.

[10] 188 U. S. 385.

[11] 198 U. S. 341.

[12] Fourteenth Amendment. As to this shifting of ground by the Federal Supreme Court, see the article by Dr. F. J. Goodnow, "Congressional Regulation of State Taxation," in the *Pol. Sci. Quar.*, vol. XXVIII (1913), p. 405.

Since the decisions in these cases, the Supreme Court has repeatedly affirmed the doctrine that the attempt of a State to tax property or persons beyond their jurisdiction will be declared void as a denial of due process of law.

§ 866. Personal Liability of the Property Owners.

The right to tax property depending upon the actual or constructive presence within the jurisdiction of the property taxed, in the case of a tax thus operating *in rem* rather than *in personam* against the owner, it has been held that an owner not domiciled in the State, cannot be made personally liable for the tax.[13]

In Corry v. Baltimore [14] a law of Maryland was upheld which provided that stock in domestic corporations held by non-residents might be taxed, the tax to be paid by the corporations, which corporations were to have a lien upon the stock and a right of personal action against the non-resident stockholders to recover from them the amounts so paid. This law had, however, been construed by the Maryland courts, and this construction was accepted by the United States Supreme Court, to be, in reality, not a tax upon the stock as property, but a reasonable regulation upon the right to acquire the stock of the corporations which the State had created.

All incorporeal hereditaments, such, for example, as corporate franchises, may be taxed only in the State from whose law they are derived and where, consequently, they have their legal situs.[15]

§ 867. Real and Tangible Personal Property: Situs of, for Taxation.

There has never been question that real property may be taxed only by the sovereign of the actual situs, and, regarding this situs, there is, of course, no possible question so far as lands and improvements thereupon are concerned. As regards, however, interests, legal and equitable, in lands, arising by reason of deeds of trust, mortgages, receiverships, succession, etc., questions as to situs for purposes of taxation can arise, and they will be discussed in later sections of the present chapter.

That tangible personal property of all kinds may be taxed by the State within which it is situated has never been questioned.[16]

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[13] Dewey v. City of Des Moines (173 U. S. 193).

So far as a tax operates upon persons, domiciliation in the State is the test. The terms "residents" and "inhabitants" when used in tax laws are, therefore, generally to be construed as referring to persons domiciled in the State.

[14] 196 U. S. 466.

[15] *Cf.* Cooley, *Taxation*, 4th ed., 448.

[16] See, for example, Coe v. Errol (116 U. S. 517); Brown v. Houston (114 U. S. 622); and other cases relating to the taxation by the State of articles of interstate commerce.

That tangible personal property situated in one State may not be taxed by another State, even though its owner be domiciled therein, was definitely stated in Union Refrigerator Transit Co. v. Kentucky,[17] decided in 1905.

§ 868. Vessels: Situs of, for Taxation.

No general rule may be laid down for determining the situs of vessels for purposes of taxation. In the absence of countervailing practical reasons, their situs may be said to be the place where registered, but these countervailing reasons are so many that this rule is not of great value.

As to vessels plying between the ports of different States, and engaged in coastwise traffic, their situs is ordinarily held to be the domicile of the owner,[18] and irrespective of the place of registry. But even this rule is subject to the exception that where a vessel had acquired an actual situs in a State other than that of its owner, it may be taxed by that State.[19]

§ 869. Taxation of Property Situated in Several Jurisdictions.

The instrumentalities through which commerce is carried on between the States and with foreign countries may be taxed by the States as property to the extent that such instrumentalities are within the several territories of the States so taxing them. Thus, buildings used for freight and passenger stations and for offices, roadbeds, rails, machine shops, etc., may be taxed by the States in which they are situated, so long as the tax is a general property tax and not one laid upon them specially, nor at a special rate because of their employment in interstate commerce. In determining, however, the value of these properties, the important principle has been laid down that, in estimating the value of the property within the State, of a company doing business in several States, the entire property may be treated as a unit and its value in use as such determined, and the value of the part of the property in the particular State estimated as bearing the same proportion to the whole property as the amount of the business done in the State bears to the entire business done by the company, or the mileage of tracks of a railway company, or of wires, of a telegraph or telephone company, bears to the entire mileage of tracks or wires of the company taxed.

§ 870. The Unit Rule.

As to railroad, telegraph and sleeping-car companies engaged in interstate commerce the rule is, as stated by the court in Adams Express Co.

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[17] 199 U. S. 194.

[18] Ayer & L. Tie Co. v. Kentucky (202 U. S. 409).

[19] Southern Pacific Co. v. Kentucky (222 U. S. 63).

v. Ohio State Auditor,[20] "that their property in the several States through which their lines or business extended might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction.[21] The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping-car company, but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 429); or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State (Western U. Tel. Co. v. Taggart, 163 U. S. 1)." [22]

This "unit in use" principle of valuation received a radical application in the case of Adams Express Co. v. Ohio State Auditor,[23] decided in 1897, for there the actual tangible property within the State was inconsiderable, whereas the value of the entire concern measured by the amount of business done was very great. Furthermore, there was there lacking that physical unity of plant which is found in railroad and telegraph companies.

In taxing the property within the State of a company operating in two or more States the not unusual practice has been to levy the tax on the capital stock of the company, taking as the basis of assessment such proportion of its capital stock as the amount of its business within the State bears to the entire business done; and in railroads, telegraph and telephone companies, determining this proportion by the proportion of the total mileage of track or wires lying within the State. This, for example, was the method employed in the leading case of Pullman's Palace Car Co. v. Pennsylvania,[24] decided in 1891. This also was the method employed in Delaware, L. & W. R. Co. v. Pennsylvania,[25] in which, it will be remembered, it was held that in appraising the capital stock, tangible property located in other States might not be included.

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[20] 165 U. S. 194, 220.

[21] Citing Western U. Tel. Co. v. Massachusetts (125 U. S. 530); Massachusetts v. Western U. Tel. Co. (141 U. S. 40); Maine v. Grand Trunk R. Co. (142 U. S. 217); Pittsburg, C., C. & St. L. R. Co. v. Backus (154 U. S. 421); Cleveland, C., C. & St. L. R. Co. v. Backus (154 U. S. 439); Western U. Tel. Co. v. Taggart (163 U. S. 1); Pullman Palace Car Co. v. Pennsylvania (141 U. S. 18).

[22] In the earlier part of this quotation the tense has been changed.

[23] 165 U. S. 194; 166 U. S. 185.

In a series of cases the Supreme Court has held that in taxing the rolling stock of railway, sleeping-car and refrigerator companies, a State may estimate the number of cars upon the average kept and used within the State, and for the determination of this average may use any reasonable rule, the one ordinarily employed being that of mileage.[26] Conversely that part of the property of a corporation which upon an average is kept and employed outside of the State may not be taxed.[27]

In Great Northern R. Co. v. Minnesota [28] was upheld a State tax upon the property within the State of an interstate railroad, the basis for computing the tax being that each railroad company should report annually its gross earnings upon business done upon its lines wholly within the State, and upon interstate business in the proportion which the mileage within the State bears to the entire mileage of the railroad over which such interstate business was done.

§ 871. Taxation of Intangible Personal Property.

Whereas, with reference to the taxation of tangible personal property, the practice has been to determine its situs by its actual location, with respect to intangible personalty, the principle of *mobilia sequuntur personam* has generally, though as we shall presently see, not always been applied.

In Union Refrigerator Transit Co. v. Kentucky [29] the court said: "There is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this court."

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[24] 141 U. S. 18.

[25] 198 U. S. 341.

[26] Pullman's Palace Car Co. v. Pennsylvania (141 U. S. 18).

[27] Union Refrigerator Transit Co. v. Kentucky (199 U. S. 194); New York *ex rel.* N. Y. C. & H. R. R. Co. v. Miller (202 U. S. 584).

[28] 278 U. S. 503.

[29] 199 U. S. 194, 205.

§ 872. Doctrine of State Tax on Foreign-Held Bonds Case.

However, in the case of State Tax on Foreign-Held Bonds,[30] decided in 1873, was laid down a rule and declarations made which, if strictly adhered to, would have greatly embarrassed the States in their attempts to tax intangible personal property, at least in the form of bonds, stock, etc., of domestic corporations, and of mortgages upon lands situated within their limits. In this case it was declared that bonds and other evidences of indebtedness of a domestic corporation are property in the hands of the holders, and, when held by non-residents of the State in which issued, are property beyond the jurisdiction of, and therefore not taxable by, that State despite the fact that these bonds are secured by mortgages on property situated within the State. The law contested in this case had required that a railroad company should, before the payment of the interest on certain of its bonds, retain out therefrom the amount of the tax and pay it over to the State. By this direction, it was held, the law operated to impair the obligation of the contract between the company and its non-resident bondholders. And the court held that it was such an impairment because it was not a proper exercise of the taxing power, even though the bonds were secured by mortgages on property situated within the State.

However, as has been said, the principles broadly laid down in this case were soon modified, with the final result that the authority of the case has been held down to the precise point decided, as will appear in the sections which follow.

§ 873. Taxation of Shares of Stock.

Shares of stock in incorporated companies may be viewed either as property in the hands of their holders or as representing the property of the company. Thus they are viewed in the latter light when their value is taken as measuring the value of the property of the company for the purposes of a property tax upon that company. In such cases, as we have seen, tangible property of the company permanently located outside of the State may not be included in the appraisement. The States may also levy a license tax upon a domestic corporation, that is, upon its right not simply to be, but to do business within the State, and this license tax it may measure by the value of the capital stock. Also a State may levy a similar tax upon a foreign corporation, unless engaged in interstate commerce, the payment of which is made a condition precedent to its right to enter the State and to do business therein, and measure this tax by the nominal or market value of the capital stock of the company. In both of these cases the tax is not, in reality, upon the capital stock, but is measured by it.[31]

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[30] 15 Wall. 300.

§ 874. Taxation of Mortgages.

In Savings and Loan Society v. Multnomah County [32] the broad *dicta* of the court in the State Tax on Foreign-Held Bonds Cases were again modified, this time with reference to the taxation of mortgages. In this case the court held that mortgages, whether held by residents or non-residents, may be taxed at their full value by the State in which the mortgaged property is located, and that this may be done either by taxing the whole value of the property to the mortgagor or by taxing to the mortgagee the interest represented by the mortgage and the remainder to the mortgagor.

§ 875. Taxation of Credits.

In the preceding paragraphs we have seen that mortgages and shares of stock have been taken out of the broad doctrine declared in the State Tax on Foreign-Held Bonds Cases, which placed them under the rule of *mobilia sequuntur personam.* To a very considerable extent the same is true as to promissory notes and similar evidences of indebtedness. The rule of *mobilia sequuntur personam* has not been followed when the notes have been placed in the hands of an agent for receipt of the interest or for the collection of the capital sums. In such cases the situs of the notes has in some cases been held to be that of the agent; in others, where there has been apparent a scheme to avoid the payment of taxes, the situs has been held to be at the domicile of their owner.[33]

§ 876. Incorporeal Hereditaments: Franchises, etc.

Incorporeal hereditaments, such, for example, as corporate franchises, may be taxed only in the State from whose law they are derived, and where, consequently, they have their legal situs.[34] This doctrine is clearly stated in Louisville & Jeffersonville Ferry Co. v. Kentucky.[35] In this case it was held that a Kentucky corporation operating a ferry across the Ohio river was deprived of its property without due process of law by the action of the State in including, for purposes of taxation, in the valuation of its franchise derived from Kentucky, the value of a franchise derived from Indiana for a ferry from the Indiana to the Kentucky shore. The court said: "Beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky."

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[31] *Cf.* Tappan v. Merchants' National Bank (19 Wall. 490); Corry v. Baltimore (196. U. S. 466); W. U. Tel. Co. v. Kansas (216 U. S. 1); Hawley v. Malden (232 U. S. 1).

[32] 169 U. S. 421.

[33] Kirktland v. Hotchkiss (100 U. S. 491); New Orleans v. Stempel (175 U. S. 309); Bristol v. Washington Co. (177 U. S. 133); State Board of Assessors v. Comptoir National D'Escompte (191 U. S. 388); Buck v. Beach (206 U. S. 392); Liverpool L. & G. Ins. Co. v. Board of Assessors (221 U. S. 346); Fidelity and Columbia Trust Co. v. Louisville (245 U. S. 54). But see Farmers Loan and Trust Co. v. Minnesota (280 U. S. 204), qualifying and in part overruling Blackstone v. Miller (188 U. S. 189, 209).

[34] As to Federal taxation of State-granted franchises, see § 96.

§ 877. Taxation of Good-Will.

That a franchise may be taxed as a piece of property, and that, in estimating the value of this property, the value of the good-will of the company may be included, is clearly established in Adams Express Co. v. Ohio.[36]

In New York *ex rel.* Metropolitan Street Railway Co. v. Tax Commissioners [37] it was held that a tax levied specially upon the franchise of the company as a piece of property of value was not a double tax, because a lump sum had been paid at the time the franchise was granted, and an annual payment of a fixed amount or fixed percentage of earnings, such payments not having been specifically declared to be in lieu of taxes. The fact that for many years the State had not attempted to levy such a special franchise tax was held not to be an estoppel upon the State.

§ 878. Inheritance Taxes.

It would appear that there are no constitutional limits to the right of the State to determine the conditions under which the right to transmit property, or upon the privilege of taking property by will or descent, may be exercised, or it may abolish such right or privileges altogether. It follows that the State is conceded to have a discretionary right to impose such taxes as it may desire upon the enjoyment of these privileges or rights.[38] These taxes may be upon the transmission or the exercise of the legal power of transmitting property by will or descent; [39] or they may be upon the legal privilege of taking property by devise or descent.[40]

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[35] 188 U. S. 385.

[36] 166 U. S. 185.

[37] 199 U. S. 1.

[38] Mager v. Grima (8 How. 490); United States v. Perkins (163 U. S. 625); Knowlton v. Moore (178 U. S. 41); Campbell v. California (200 U. S. 87).

[39] United States v. Perkins (163 U. S. 625); Plummer v. Coler (178 U. S. 115); New York Trust Co. v. Eisner (256 U. S. 345). The present Federal inheritance tax is upon the right to transmit.

[40] Magoun v. Illinois T. & S. Bank (170 U. S. 283); Knowlton v. Moore (178 U. S. 41); Campbell v. California (200 U. S. 87).

It is clear, then, that, when the taking or the right to take property under a will or by succession is involved the right to tax is exercisable by the State whose laws control the taking or the right to take. Thus, in general, with reference to the estates of non-resident decedents it has been held that, as to property within the State, an inheritance tax may be sustained as one upon the right of succession or as a transfer of title tax.[41]

Two comparatively recent cases of great interest with reference to the essential nature of inheritance taxes and as to jurisdiction of the States in relation thereto as concerns property located outside the taxing State is that of Frick v. Pennsylvania,[42] decided in 1925, and Blodgett v. Silberman.[43] In the Frick case and several others grouped with it, the plaintiffs in error contended that, in so far as the Pennsylvania statute sought to tax the transfer of tangible personal property having an actual situs outside the State, the statute was in contravention of the due process of law clause of the Fourteenth Amendment.

The court admitted that this precise question had never before been presented to it, but said that there were many earlier cases which pointed the way to its solution. These cases had shown that the exaction by a State of a tax which it was without power to impose operated as a taking of property without due process of law; that a State cannot give an extraterritorial operation to its tax laws; and that, as to tangible personal property, only that State can tax it within which it has its actual situs, regardless of the domicile of its owner. Other decisions had also shown that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of its owner rests in the State of its situs. The Pennsylvania law in the instant case, the court found, was a tax law and not an escheat law, nor was it a property tax. It was one on the transfer of property on the death of the owner. As applied to tangible personalty located outside the State, although its owner was domiciled in the State, the court held that the law could not operate. In this respect, said the court, the situation was the same as if the property had been immovable realty. "The jurisdiction possessed by the States of the situs was not partial but plenary, and included power to regulate the transfer both *inter vivos* and on the death of the owner, and power to tax both the property and the transfer." In Blackstone v. Miller [44] it was pointed out, had to deal with intangible personalty which has a different footing from tangible property.

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[41] Blackstone v. Miller (188 U. S. 189). But see Keeney v. New York (222 U. S. 525); and Farmers Loan and Trust Co. v. Minnesota (280 U. S. 204) modifying the doctrine declared in Blackstone v. Miller.

[42] 268 U. S. 473. Four cases were decided under this title.

[43] 277 U. S. 1.

[44] 188 U. S. 189.

In Blodgett v. Silberman [45] the doctrine was reaffirmed that a tax upon all property which passes by will or inheritance is not, essentially, a property tax, but one upon the right or privilege of succession to the property, and that the State of a person's domicile has the constitutional right to impose such a succession tax with regard to intangible personalty even when the evidences of such property are outside of the State at the time of the decedent's death.[46] As to the common-law maxim *mobilia sequuntur personam*, the court said that "it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not." Furthermore, the court said: "This principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction."

In effect, the court decided that intangible personalty, subject to a succession tax at the domicile of the owner, includes: (1) Partnership interests in limited partnerships in another State; (2) United States bonds in safe deposit boxes in another State; (3) Certificates of stock in foreign corporations; (4) Savings bank accounts in another State; (5) Life insurance policies of foreign corporations; but that coins and bank notes, i. e., actual cash, in safe deposit boxes in another State, were not so included.

In Rhode Island Hospital Trust Co. v. Doughton,[47] it was held that a State cannot impose an inheritance tax upon stock of a foreign corporation held by a non-resident merely because the corporation is doing business within the State, and that two-thirds of its property is located there.

In Farmers Loan & Trust Co. v. Minnesota,[48] it was held that the imposition of an inheritance tax by a State upon obligations of the State or of its municipalities, owned by a resident of another State, in which they were subjected to an inheritance tax, was unconstitutional as an attempt to tax property beyond the jurisdiction of the taxing State. The earlier case of Blackstone v. Miller [49] had lent support to the doctrines that, ordinarily, choses in action are subject to taxation both at the debtor's domicile and the creditor's domicile, and that two States might tax on different and more or less inconsistent principles the same testamentary transfer of such property. These doctrines, the court declared in Farmers' Loan & Trust v. Minnesota (*supra*) could no longer be regarded as a correct exposition of the law. In general the effect of this last case is to give to intangibles the same protection against taxation in two places as is given to tangibles.[50]

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[45] 277 U. S. 1.

[46] The court pointed out that the inheritance taxes of four-fifths of the States were predicated upon this right; that the right had been upheld by the courts of the States, and also by the Federal Supreme Court both before and since the adoption of the Fourteenth Amendment. Carpenter v. Pennsylvania (17 How. 456); Orr v. Gilman (183 U. S. 278); Keeney v. Comptroller (222 U. S. 525); and Bullen v. Wisconsin (240 U. S. 625).

[47] 270 U. S. 69.

[48] 280 U. S. 204.

[49] 188 U. S. 189.

§ 879. State Income Taxes.

It is established that States may impose taxes on incomes accruing to non-residents from property, or business carried on, in the State, and enforce the collection of such taxes so far as they are able by the exercise of a just control over persons or property within their several borders; provided, however, that such taxes are not made more onerous upon non-residents than they are upon residents. This, the court said in Shaffer v. Carter,[51] is consonant with numerous of its decisions sustaining State taxation of credits due to non-residents.[52]

§ 880. Income from Trust Funds.

In Maguire v. Trefry,[53] decided in 1920, the court held valid the law of the State of Massachusetts taxing the income of a resident of the State from a trust, administered under the laws of another State, in securities in the possession of the trustee in such other State. "It is true," said the court, "that the legal title of the property is held by the trustees in Pennsylvania. But it is so held for the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership. . . . It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts."

In the recent case of Safe Deposit and Trust Co. v. Virginia [54] was held unconstitutional, as in violation of the Fourteenth Amendment, the attempt of a State in which the beneficiaries of a trust resided, to tax securities in the possession of a trustee in another State, to the control or possession of which the beneficiaries had no present right. Undoubtedly, the securities were located in the State in which the trustee resided, and, said the court, "it would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

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[50] See the opinions in this case for a general discussion of the situs of intangibles. *Cf.* Baldwin v. Missouri (decided May 26, 1930).

[51] 252 U. S. 37. See also Travis v. Yale & Towne Mfg. Co. (252 U. S. 60), decided at the same time.

[52] Citing New Orleans v. Stempel (175 U. S. 309); Bristol v. Washington County (177 U. S. 133); Liverpool Ins. Co. v. Orleans Assessors (221 U. S. 346).

[53] 253 U. S. 12.

[54] 280 U. S. 83, 94.

§ 881. Double Taxation.

We have seen that the right of a State to tax depends upon its jurisdiction over the object taxed, and that this jurisdiction is obtained by either actual or constructive presence of the object within the State's territorial limits. This constructive presence applies to personal property and depends upon the principle *mobilia sequuntur personam.* As to personal property it is thus possible that it may actually be in one State and be there taxed, and constructively in another State and there also taxed. The fact that one State has exercised its jurisdiction with reference to a matter, whether of taxation or otherwise, clearly can impose no obligation upon another State not to exercise such jurisdiction as it may have. This the Supreme Court of the United States has repeatedly recognized. In Coe v. Errol [55] the court said: "If the owner of personal property resides within a State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also." In Blackstone v. Miller [56] the court said: "No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law." [57] However, in Farmers Loan and Trust Co. v. Minnesota [58] as regards the imposition of an inheritance tax by one State, upon choses of action owned by a resident of another State and there subjected to an inheritance tax, this doctrine was expressly overruled.

The double taxation of a piece of property by the same State is, however, forbidden not only by the several constitutions of most of the States, but by the Fourteenth Amendment.

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[55] 116 U. S. 517.

[56] 188 U. S. 189.

[57] Citing Coe v. Errol (116 U. S. 517); Knowlton v. Moore (178 U. S. 41). See also Kidd v. Alabama (188 U. S. 730).

[58] 280 U. S. 204.

CHAPTER LXXXVI

EQUAL PROTECTION OF THE LAWS

§ 882. Equal Protection and Due Process.

By the Fourteenth Amendment it is provided: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." No similar express prohibition is directed to the Federal Government by the Fifth Amendment which contents itself with the prohibition relating to due process of law. However, as will have been seen in the chapters which have preceded, this due process clause has been given an interpretation which brings within its scope many forms of arbitrary or unreasonable discriminatory action which might be brought, and, when the States have been concerned, have been brought within the prohibition of denial of equal protection of the laws. Indeed, to such an extent has this been true, that it is still difficult to say precisely in what specific respects the prohibition of the denial of equal protection of the laws operates to impose restraints not already covered by the prohibition with regard to the depriving of persons of life, liberty or property without due process of law.

The fact that the requirement as to due process includes, to a very considerable extent at least, the guarantee of equal protection of the laws, is especially shown in the opinion of the court in Smyth v. Ames [1] where it is said: "The equal protection of the laws, which by the Fourteenth Amendment no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."

The possible distinction between the two prohibitions we find touched upon by Chief Justice Taft in his opinion in Truax v. Corrigan.[2] He there said: "It may be that they [the two prohibitions] overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not conterminous. . . . The due process clause . . . of course tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. . . . But the framers and adopters of this [Fourteenth] Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process." Thus, in the instant case, the Chief Justice pointed out that the State statute under examination which prohibited interference by injunctions in disputes between employers and employees concerning terms or conditions of employment resulted in the recognition of one set of actions against ordinary tort feasors and another set against tort feasors in labor disputes. The contention that no one has a vested right to injunctive relief, he said, did not meet the objection that the granting of equitable relief to one man or set of men, and denying it to others under like circumstances and in the same jurisdiction was a denial of the equal protection of the laws.

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[1] 169 U. S. 466, 524.

[2] 257 U. S. 312, 332, 333.

In Hayes v. Missouri [3] the court said of the Fourteenth Amendment that it "does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed." Having quoted this statement, Chief Justice Taft, in Truax v. Corrigan, added: "Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

From what has been said it is clear that, in many cases, laws which have been held invalid as denying due process of law might also have been so held as denying equal protection of the laws, or *vice versa*, and that, in fact, in not a few cases the courts have referred to both prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises.

One of the best general statements of the scope and intent of the provision for the equal protection of the laws is that given by Justice Field in his opinion in Barbier v. Connolly,[4] in which, speaking for the court, he said:

"The Fourteenth Amendment in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

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[3] 120 U. S. 68, 71, 72.

[4] 113 U. S. 27, 31, 32.

§ 883. Yick Wo v. Hopkins.

The case of Yick Wo v. Hopkins [5] involved the validity of an ordinance of the City of San Francisco which required all persons desiring to establish laundries in frame houses to obtain the consent of certain municipal officials. Here the law or ordinance was not upon its face discriminatory, but it was held void for the reason that it gave to the designated officials "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons," and because the evidence showed in fact "an administration directed so exclusively against a particular class of persons [the Chinese] as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners as to all other persons by the broad and benign provisions of the Fourteenth Amendment." The court then went on to declare the general doctrine: "Though itself the law be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." [6]

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[5] 118 U. S. 356, 366, 373, 374.

§ 884. Equal Protection Requirement Directed to State Action.

The provision of the Fourteenth Amendment guarantees to individuals and to corporations that they shall not by State law be excluded from the enjoyment of privileges which other persons and corporations similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from. But no one is guaranteed that in fact, through the fortuitous operation of a law, which in itself is not discriminative, a special burden may not be imposed, or the enjoyment of a privilege taken away. Thus, for example, in Strauder v. West Virginia [7] a State law was held invalid which denied to members of the colored race the right to act upon juries, the court saying, "the law in the State shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the State." But in Virginia v. Rives [8] and other cases [9] it was held that the fact that it happened that no negroes were in fact drawn upon the jury, or *vice versa*, that no whites were so drawn was not constitutionally objectionable, unless it affirmatively appeared that the State officials intrusted with the administration of the law arbitrarily and with intent had given an unequal and discriminating effect to the law.[10]

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[6] This principle of interpretation was declared to have been sanctioned in Henderson v. Mayor (92 U. S. 259); Chy Lung v. Freeman (92 U. S. 275); *Ex parte* Virginia (100 U. S. 339); Neal v. Delaware (103 U. S. 370); and Soon Hing v. Crowley (113 U. S. 703). See also Gundling v. Chicago (177 U. S. 183). But see as to doctrine declared in Wilson v. Eureka City (173 U. S. 32). As to the instances in which the vesting of arbitrary powers in administrative officials has been upheld it is to be noted that they have related rather to the granting or withholding of privileges, as, for example, the use of public streets, than to the enjoyment of purely private rights.

[7] 100 U. S. 303.

[8] 100 U. S. 313.

[9] Neal v. Delaware (103 U. S. 370); Bush v. Kentucky (107 U. S. 110); Williams v. Mississippi (170 U. S. 213).

In other words, as has been earlier pointed out with respect generally to the prohibitions of the Fourteenth Amendment, they are directed against State action and not that of private individuals.

It is, however, to be observed in this connection, that the prohibitions apply to the acts of State officials even when they are not in pursuance of some State legislative direction, for, while no constitutional objection may be made to any law of the State, it has been held that its officials may exercise their public authority in such a discriminatory or arbitrary manner as to bring them within the scope of the prohibitions of the Fourteenth Amendment. This, it will be remembered, was one of the grounds upon which, in Yick Wo v. Hopkins [11] it was held that due process of law had been denied. In Tarrance v. Florida [12] the administration of a State law and not the law itself was challenged and the court said: "Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law."

However, it would appear that as to whether or not in fact discrimination has been practiced in the administration of a State law, the Supreme Court holds itself almost, if not absolutely, concluded by the finding of the State courts. In Thomas v. Texas [13] the court with reference to whether the State jury commissioners had, in the selection of grand and petit juries discriminated against negroes, said: "This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to State courts."

§ 885. Equal Protection of the Law Does Not Control the Grant of Political Rights.

The requirement as to equal protection of the law does not operate to prevent the States from restricting the enjoyment of political privileges to such classes of their citizens as they may see fit.[14]

§ 886. Disfranchising Clauses of the Constitutions of the Southern States.

The constitutionality of the disfranchising clauses of certain of the Southern States as tested by the requirement of equal protection of the laws has been particularly considered in an earlier chapter.[15]

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[10] See Gibson v. Mississippi (162 U. S. 565).

[11] 118 U. S. 356.

[12] 188 U. S. 519.

[13] 212 U. S. 278.

[14] See § 141.

[15] See § 234. However, it may be noted that in the recent case of Nixon v. Herndon (273 U. S. 536), it was held that a State statute making negroes ineligible to partici-

§ 887. Reasonable Classifications by Law Not a Denial of Equal Protection.

It will have been seen that the requirement of equal protection of the law applies to all persons similarly situated or circumstanced. Hence, where there are rational grounds for so doing, persons or their properties may be grouped into classes to each of which specific legal rights or liabilities may be attached. This legislative discretionary right applies to the exercise of all of the powers of the States—to their taxing and police powers as well as to their other powers.

Thus, for example, the practice of certain professions may be limited to persons of the male sex, or to those of a certain age, or to those possessing other qualifications that may reasonably be held to indicate a fitness for the profession.[16]

There have been many cases upon this point, but it will be sufficient to refer to one or two of the more recent of them.

In Graves v. Minnesota [17] it was held that refusal to grant a license to practice dentistry to persons not possessing a diploma from a dental college of good standing was not unconstitutional as making an unreasonable classification between those possessing such a diploma and those without it. "Clearly," said the court, "the fact that an applicant for a license holds a diploma from a reputable dental college has a direct and substantial relation to his qualification to practice dentistry." [18]

In Hayman v. Galveston [19] it was held that an osteopathic physician was not denied due process of law or the equal protection of the laws by being excluded from the privileges of a hospital maintained by the State or by a political subdivision thereof, the use of which was reserved for purposes of medical instruction.

As proper police measures, the States are permitted to impose special restrictions and liabilities upon railway corporations. Special modifications of the common-law doctrine of employer's liability with reference to them have been upheld, as have laws placing the presumption of negligence upon them when cattle have been killed by their trains, and laws making them responsible for fires kindled by sparks from their

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pate in primary elections of a political party was unconstitutional as denying to negroes the equal protection of the laws. Such denial, it was declared, was of a substantive character for which damages might be sued for and recovered.

[16] *Re* Lockwood (154 U. S. 116); Bradwell v. Illinois (16 Wall. 130).

[17] 272 U. S. 425.

[18] Generally, as to the power of the States in the exercise of their police powers, to require qualifications for the practice of medicine or dentistry, see Dent v. West Virginia (129 U. S. 114); Douglas v. Noble (261 U. S. 165). As to State decisions, see cases cited in the court's opinion in Graves v. Minnesota (272 U. S. 425).

[19] 273 U. S. 414.

locomotives, though they may have taken every possible precaution to avoid such fires.[20]

However, in Gulf, etc., Ry. Co. v. Ellis [21] a State law was held void which imposed an attorney's fee in addition to costs upon railway companies which should fail to pay certain claims within a certain time after presentation. Here the court held that there was no reasonable relation between the burden imposed and the peculiar character of the business done.

In Atchison, T. & S. F. R. Co. v. Mathews,[22] however, a State statute was held not to deny equal protection of the laws which required a reasonable attorney's fee for the plaintiff to be allowed and made a part of a judgment against a railroad company for damages from fires caused by the operation of its trains. Distinguishing the case from that of Gulf, etc., Ry. Co. v. Ellis, (*supra*) the court found the questioned statute to be one of a police character, designed to induce upon the part of railway companies greater care to prevent injuries, the likelihood of which is peculiar to the operations carried on by them.[23]

In McLean v. Arkansas [24] it was held that the exemption of coal mines not employing ten or more men from the operation of a State law with regard to wages contracts was not a denial of the equal protection of the laws. "We cannot say," said the court, "that there was no reason for exempting from its [the law's] provisions mines so small as to be in the experimental or formative state, and affecting but a few men, and not requiring regulation in the interest of the public health, safety, or welfare."

In Jeffrey Mfg. Co. v. Blagg [25] it was held that equal protection of the laws was not denied by a law which provided that employers having five or more employees should be subject to the requirements of a State workmen's compensation law to which other employers were not subjected.

In Middleton v. Texas Power and Light Co.[26] it was held that equal protection of the laws was not denied by a workmen's compensation act which excluded from its operation domestic servants, farm laborers, employees of railways, laborers working cotton gins, and employees of persons employing no more than five employees. A reasonable ground for such exclusions was found by the court, or, at least, it was not willing to overturn the judgment of the legislature that such reasonable grounds existed.

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[20] See especially St. Louis, etc., Co. v. Mathews (165 U. S. 1); Missouri Pacific Ry. Co. v. Mackey (127 U. S. 205).

[21] 165 U. S. 150, 165.

[22] 174 U. S. 96.

[23] Justice Harlan dissented in a long and able opinion.

[24] 211 U. S. 539.

[25] 235 U. S. 571.

[26] 249 U. S. 152.

It is clear, then, that, while classification of persons and businesses for purposes of regulation is not prohibited by the requirement of equal protection of the law, these classifications must in every case be reasonable ones. In Gulf, etc., Ry. Co. v. Ellis, already cited, it was declared: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

In Power Mfg. Co. v. Saunders [27] a State law was held to deny the equal protection of the laws which permitted foreign corporations doing business in one county of the State to be sued in other counties where it did no business and had no office, officer or agent, on a cause of action arising in the county where it did business, such permission not being granted with reference to domestic corporations.

The court pointed out that the prohibition with regard to the denial of equal protection applies to corporations as well as to natural persons, that the instant discrimination was a real and substantial one, and that it had no reasonable relation to the subject of the legislation in question.

In Kentucky Finance Corporation v. Paramount Auto Exchange Corporation [28] the court held that equal protection was denied by a State law which provided that a non-resident corporation going into a State to recover possession of property wrongfully taken from it and taken into the State should be required, without service of process, to send its officers into the State and submit to examination before trial under penalty of dismissal of the suit, residents of the State being required to submit to examination only in the counties of their residence, and service of process upon them being required before examination.

In Ohio *ex rel.* Clarke v. Deckebach [29] it was held that equal protection was not denied by a municipal ordinance which forbade the issuance of pool or billiard room licenses to aliens.[30] The court said: "The regulation or even prohibition of the business is not forbidden (Murphy v. California, 225 U. S. 623). The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. . . . It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong.[31] Some latitude must be allowed for the legislative appraisement of local conditions . . . and for the legislative choice of methods for controlling an apprehended evil." [32]

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[27] 274 U. S. 490.

[28] 262 U. S. 544.

[29] 274 U. S. 392, 397.

[30] The ordinance was held not to violate a treaty regulating commerce between the United States and a foreign nation which guaranteed reciprocal liberties of commerce between the territories of the signatories, and that the merchants and traders of each nation should enjoy complete protection and security for their commerce.

In New York *ex rel.*, Bryant v. Zimmerman *et al.*,[33] it was held that equal protection of the laws was not denied by a State law which provided that every existing membership corporation or unincorporated association having a membership of twenty or more persons and requiring an oath as a condition of membership "other than a labor union or a benevolent order mentioned in the Benevolent Orders Law," should file with the Secretary of State sworn copies of its constitutions, by-laws, roster of members, etc. In this case the offence charged against the relator was his attendance upon the meetings and his membership of a Ku Klux Klan which had not complied with the law.

In Silver v. Silver [34] it was held that equal protection was not denied by a law releasing onwers of motor vehicles from responsibility for injuries to guests in cases of accident occasioned by ordinary negligence, whereas such responsibility was not released with regard to guests in other classes of vehicles.

§ 888. State Laws and Judicial Systems Not Required to Be Uniform throughout the State

In Missouri v. Lewis [35] the important principle was laid down that the equal protection clause of the Fourteenth Amendment does not prevent the application by a State of different laws and different systems of judicature to its various local subdivisions. In this case was questioned the constitutionality of a law providing a special court of appeals with exclusive jurisdiction for the City of St. Louis and a few specified counties. To the claim that this law denied to the people of these districts the equal protection of the laws in that they were denied access to the general court of appeals of the State the Supreme Court replied: "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. . . . The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. . . . Diversities which are allowable in different States are allowable in different parts of the same State."

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[31] Citing Ft. Smith Light and Traction Co. v. Board of Improvement (274 U. S. 387).

[32] Citing Patsone v. Pennsylvania (232 U. S. 138).

[33] 278 U. S. 63.

[34] 280 U. S. 117.

[35] 101 U. S. 22.

§ 889. Segregation: Race Discriminations: Equal Protection Requires Similar but Not the Same Privileges.

Where similar or substantially similar conveniences and comforts are offered, transportation companies, inns, theatres, and other public service companies may by law be permitted or required to provide separate accommodations to the different races, colored, Asiatic, or white.[36]

So far as interstate commerce is concerned, it was held in Chiles v. Chesapeake & O. R. Co.[37] that congressional inaction in the premises is equivalent to a declaration that carriers may, by regulations adopted by themselves, segregate white and negro passengers in separate coaches or in different divisions of the same coaches.

In McCabe v. Atchison, T. & S. F. R. Co.[38] it was held that a State statute providing for the segregation of whites and negroes on railway trains would have to be confined in its application wholly to intrastate transportation in order to prevent its being an unconstitutional regulation of interstate commerce, and that so much of the law as provided for sleeping, dining and chair cars exclusively for white persons without providing for similar accommodations for negroes was a denial of the equal protection of the laws. The argument that there was not a sufficient number of negro passengers to justify, from a revenue point of view, the provision of separate and similar accommodations for them, the court declared without merit.

However, in Cumming v. County Board of Education [39] it was held that equal protection was not denied by a Board of Education which, while maintaining a high school for white children, did not maintain one also for colored children for the reason that the funds available were not sufficient to maintain one in addition to the needed primary schools for colored children. The court, looking to the realities of the situation, said: "The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children. The Board had before it the question whether it should maintain, under its control, a high school for about sixty colored children or withhold the benefits of education in primary schools from three hundred children of the same race. . . . Its decision was in the interest of the greater number of colored children. . . . We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored school children of the county on account of their race."

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[36] Plessy v. Ferguson (163 U. S. 537).

[37] 218 U. S. 71.

[38] 235 U. S. 151, 544.

[39] 175 U. S. 528.

In Berea College v. Kentucky [40] the court upheld a State law, when applied to a corporation as to which the State had reserved to itself the power to alter, amend or repeal its charter, which prohibited the teaching of white and negro pupils in the same institution. The statute was held to be in effect, if not in terms, an amendment of the college's charter, and, as thus viewed, its constitutionality sustained against the charge that the exercise of private rights was unduly, and therefore unconstitutionally, restrained.

In South Covington & C. Street R. Co. v. Kentucky [41] it was held that a street railway company might be compelled by statute to furnish either separate cars or separate compartments in the same car for white and negro passengers. This State authority was scarcely questioned in this case, the only constitutional issue being as to whether or not, in the instant case, interstate commerce was interfered with.

§ 890. Municipal Segregation Residence Ordinances.

In a considerable number of cities ordinances have been issued having for their purpose the segregation of white persons and negroes, so far as the places of their residence are concerned, in specially designated areas or districts. These ordinances have had to meet not only the constitutional objection that they deny due process of law by placing, without sufficient police justification, restraint upon the use of private property, but that they deny either to white persons or to the negroes the equal protection of the laws. In general, the effort has been made to avoid the first objection by showing, or alleging, that the ordinances have a police justification in that they tend to prevent breaches of the peace between white persons and the negroes, or, at least, that they tend to prevent social friction and discord. The second constitutional objection—that relating to equal protection of the laws—they have sought to avoid by making the measures, upon their face at least, non-discriminatory, that is, placing the same or equivalent restrictions upon white persons as are placed upon the negroes.

In general, these efforts to avoid Federal as well as State constitutional prohibitions have been crowned with success so far as the State courts are concerned.[42] However, in Buchanan v. Warley [43] the movement for segregation received a serious set-back from the Supreme Court. The ordinance involved in that case classified the blocks of the city upon the basis of the relative number of residences and places of public assembly for negroes as compared with those for white persons and prohibited any white or colored person from taking up his residence or establishing and maintaining any place of public assembly in any block upon which the greater number of houses were already occupied by persons of the opposite race. The instant suit was one by the plaintiff, a white man, for specific performance of a contract for the purchase of a piece of real estate, the defendant, a negro, attempting to justify his refusal of performance on the ground that he should not be compelled to accept a deed unless he had, under the laws of the State and of the City, the right to occupy the premises as a residence. The ordinance was declared invalid as a denial of due process of law, rather than as unconstitutionally discriminatory. The court said: "The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

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[40] 211 U. S. 45.

[41] 252 U. S. 399.

[42] State v. Gurry (121 Md. 534); Hopkins v. Richmond (117 Va. 692); State v. Darnell (166 N. C. 300); Carey v. Atlanta (143 Ga. 192); Buchanan v. Warley (165 Ky. 559).

[43] 245 U. S. 60, 81.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law." [44]

§ 891. Discriminations against Aliens.

In Atkin v. Kansas [45] as has been earlier pointed out, it was held that the States might prescribe the conditions under which public work might be done for themselves or for their municipalities, and, therefore, might limit the hours of adult labor thereupon. In Truax v. Raich,[46] however, a State law was held to deny to aliens the equal protection of the laws which provided that every employer in the State employing more than five workers at any one time, regardless of the kind or class or work or sex of the workers, should employ not less than eighty per cent qualified electors or native-born citizens of the United States. The court asserted that the police power of the State, broad and comprehensive as it is, does not make it constitutionally possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.

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[44] For a criticism of the case see the article, "The Constitutionality of Segregation Ordinances," by S. S. Field in 5 *Virginia Law Review*, 81.

[45] 191 U. S. 207.

[46] 239 U. S. 33.

In Heim v. McCall [47] decided a few weeks after the Truax case, it was held that equal protection or due process was not denied by a State law which provided that only citizens of the United States might be employed on the construction of public works by or for the State or by or for one of its municipalities, and that, in such employment, citizens of the State of New York should be given preference over other citizens of the United States. The authority relied upon was Atkin v. Kansas.[48]

In Crane v. New York,[49] decided at the same time as Heim v. McCall, was upheld a provision of the New York law which made it a misdemeanor to employ aliens on public works. If, in support of the holding in these two cases, it be said that, the States, being recognized to have a general constitutional right to regulate work by themselves or in their behalf, can impose such conditions as they may see fit, reasonable or unreasonable, impartial or discriminatory, the answer of course is, as has been held with respect to other constitutional powers of the States, that such powers may not be so exercised as to deny or violate Federal rights, privileges, or immunities.[50]

§ 892. Philippine Bookkeeping Act.

In Yu Cong Eng v. Trinidad [51] was involved the constitutionality of a statute of the Government of the Philippine Islands which prohibited Chinese merchants doing business in the Islands from keeping any account books except in the English or Spanish language, or in a local dialect. The requirement was attempted to be defended as a reasonable one for the purpose of assessing taxes. The court found that the act, if enforced, would so seriously embarrass the Chinese merchants as to drive many of them out of business, and that there was no doubt that the act, as a fiscal measure, was chiefly directed against such merchants. The discussions had in the Philippine legislature with reference to the proposed repeal of the act, said the court, left no room for doubt upon that point. After observing that it was not bound by the construction given to the act by the courts of the Islands, the Supreme Court said that it could not give to the Bookkeeping Act any other meaning than that imported by its plain language, and that, as thus construed, its effect would be to deny to Chinese merchants both due process of law and the equal protection of the laws.

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[47] 239 U. S. 175.

[48] 191 U. S. 207. For a criticism of this case on the article by Prof. T. R. Powell "The Right to Work for the State" in 16 *Columbia Law Review*, 99.

[49] 239 U. S. 195.

[50] As to the justification of laws or ordinances which deny to aliens the right to sell intoxicating liquors, based upon the premise that such business is of a special character and peculiarly subject to control under the police power, see note in 12 *Columbia Law Review*, 737.

[51] 271 U. S. 500.

CHAPTER LXXXVII

EQUAL PROTECTION OF THE LAWS AND STATE TAXATION

§ 893. Equality in Taxation.

The requirement of the Fourteenth Amendment that the States shall not deny to any persons within their several jurisdictions the equal protection of the laws is, of course, operative in the field of taxation. No similarly phrased obligation is laid upon the Federal Government, but the provision of the Fifth Amendment forbidding the taking of property without due process of law imposes an obligation broad enough to cover all or nearly all cases of unequal protection of the laws. And, furthermore, as to indirect taxes it is specifically provided that they shall be uniform throughout the United States.

Whether or not the equal protection of the laws is included within the general prohibition against the taking of life, liberty, or property without due process of law, the provision for equal protection does certainly mark off a specific right or a group of rights within the general field of rights against the violation of which by the States one is guaranteed by the Constitution. That this protection applies within the field of taxation is well established.[1]

As has been already noted, the determination as to when a tax shall be levied and upon what persons and property, and by what rule it is to be assessed and by what means collected is a legislative function. However, in levying an *ad valorem* tax, the legislature may not determine the assessment value of particular pieces of property. So also it follows that while the legislature may, within its discretion, determine freely what occupations, or classes of property or persons are to be taxed, it may not select out from the general mass of property, or general citizen body, particular pieces of property or particular individuals to bear the burden of the tax. When, therefore, a tax is laid upon certain classes of property or of persons, there must be some reasonable basis for the classifications adopted. By this is meant that there must be some substantial reason why the units, whether of property or of individuals, should be treated as distinct groups.[2]

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[1] See, for example, County of Santa Clara v. S. Pac. R. Co. (18 Fed. Rep. 385).

[2] Bell's Gap R. Co. v. Pennsylvania (134 U. S. 232). Am. Sugar Refining Co. v. Louisiana (179 U. S. 89).

§ 894. Uniformity in Taxation.

Granting the right of the legislature to classify persons and property for purposes of taxation, the requirements of due process of law and of the additional provision found in the Federal Constitution and in almost all if not in all of the State Constitutions that all laws shall be uniform, make it necessary that the assessments of all persons and property within the class or district selected for taxation shall be according to a uniform rule. Cooley states the principle as follows: "As to all taxation apportioned upon property, there must be taxing districts and within these districts the rule of absolute uniformity must be applicable. A State tax is to be apportioned through the State, a county tax through the county, a city tax through the city; while in the case of local improvements, benefiting in a special and peculiar manner some portion of the State or of a county or city, it is competent to arrange a special taxing district within which the expense shall be apportioned." [3] And again: "The rule of apportionment must be uniform throughout the taxing district, applicable to all alike; but the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation that the burden must be borne by those upon whom it justly rests. The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all." [4]

All that the rule of uniformity requires is this, that within the classes or districts taxed the law shall operate according to a uniform rule. Thus, for example, it has been generally held that a city levying a general tax may not discriminate between different wards or sections, for all property within a taxing district must be taxed alike.[5]

Connolly v. Union Sewer Pipe Co.,[6] was not concerned with taxation, but, in the course of its opinion the court found occasion to say, *obiter:* "A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. . . .

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[3] Cooley, *Constitutional Limitations*, 7th ed., 710.

[4] *Constitutional Limitations*, 7th ed., 726. The cases referred to are Morford v. Unger (8 Iowa, 82); City of Covington v. Southgate (15 B. Monr. 491); Arbegust v. Louisville (2 Bush, 271); Swift and Co. v. Newport (7 Bush, 37).

[5] This does not hold true where, by special contract made at the time a rural district is incorporated into the city, special treatment with reference to taxation has been promised. The exemption of certain pieces of property from taxation where this exemption has been for some public purpose or in return for consideration received, does not violate this principle.

[6] 184 U. S. 540, 562, 563.

A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."[7]

§ 895. Recent Cases.

The number of cases in which the validity of State laws has been contested upon the ground that they have been so unequal or discriminatory in their operation as to bring them within the terms of the prohibition of the Fourteenth Amendment with regard to the denial of the equal protection of the law has been so great that it will not be feasible, nor would it be to any great purpose to discuss them individually. The more important of them are given in the footnote.[8]

§ 896. State Inheritance Taxes and Equal Protection.

So-called inheritance taxes, that is to say, taxes collected from persons receiving property by inheritance, are levied in many of the civilized States of the world. In the United States they have several times been imposed by Federal law, and at present they are to be found in a considerable majority of the States. In many cases these taxes have been progressive, the rate being higher for larger than for smaller bequests, and collateral heirs often taxed more heavily than direct descendants. In most cases small inheritances have been wholly exempted from the operation of the tax, as have been also bequests and inheritances of real estate. In some cases State inheritance tax laws have been held questioned because containing some special obnoxious provisions, but the ground upon which they have usually been attacked has been that they have violated the requirements of equality and uniformity, because of their progressive features, and because of the exemptions referred to above. In general, however, the laws have been upheld.[9]

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[7] Generally upon the subject of classifications, see Barbier v. Connolly (113 U. S. 27); Home Ins. Co. v. New York (134 U. S. 594); Magoun v. Illinois T. & S. Bank (170 U. S. 283); Orient v. Daggs (172 U. S. 557); Tinsley v. Anderson (171 U. S. 101).

[8] Southwestern Oil Co. v. Texas (217 U. S. 114); Engel v. O'Malley (219 U. S. 128); Citizens Telephone Co. v. Fuller (229 U. S. 322); Heisler v. Thomas Colliery Co. (260 U. S. 245); Oliver Mining Co. v. Lord (262 U. S. 172); Raley & Bros. v. Richardson (264 U. S. 157); Air-Way Electric Appliance Corp. v. Day (266 U. S. 71); Louisville Gas & El. Co. v. Coleman (277 U. S. 32); Quaker City Cab Co. v. Pennsylvania (277 U. S. 389); Bekins Van Lines v. Riley (280 U. S. 80); Ohio Oil Co. v. Conway [decided April 14, 1930].

[9] The constitutionality of laws exempting small estates is asserted in State v. Clark (30 Wash. 439); State v. Alston (94 Tenn. 674); *In re* Wilmerding (117 Cal. 281); Estate of Stanford (126 Cal. 112); State v. Hamlin (86 Me. 495); Minot v. Winthrop (162 Mass. 113); Crocker v. Shaw (174 Mass. 266); Gelsthrope v. Furnell (20 Mont. 299); High v. Coyne (93 Fed. Rep. 450); Morris' Estate (50 S. E. Rep. 682); Union

In many cases the classifications of the State laws have been upheld as reasonable in themselves, but fundamentally the principle upon which the validity of the laws has been sustained is that an inheritance tax is not a tax upon the property inherited but upon the right to inherit; and that, inasmuch as this is a right which exists only by statute, it is one that may be regulated at the will of the legislature which creates it.[10]

A leading case in the Federal courts as to the constitutionality of a State inheritance tax law as tested by the requirements of the Fourteenth Amendment, is that of Magoun v. Illinois Trust and Savings Bank.[11]

In this case the doctrine was reaffirmed that an inheritance tax is not one on property but on the right to take property by devise or descent, and that this, being a right of legislative creation, the States may attach conditions thereunto. Hence, it was held, the States may, in taxing this privilege, discriminate between relatives and between relatives and strangers without violating State constitutional provisions requiring uniformity and equality of taxation, or the provision of the Fourteenth Amendment prohibiting the denial of the equal protection of the laws. The provision of the Fourteenth Amendment, the court said, does not require "exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

Trust Co. v. Wayne (125 Mich. 487); Ferry v. Campbell (110 Iowa, 290); Hickok's Estate (Vt.) (62 Atl. Rep. 724); Frothingham v. Shaw (175 Mass. 59); Appeal of Nettleton (56 Atl. Rep. 565); Estate of Magnes (32 Colo. 527); Pullen v. Commissioners of Wake Co. (66 N. C. 361); Black v. State (113 Wis. 205).

The constitutionality of a law discriminating between lineal and collateral descendants and between relatives and strangers in blood has been sustained in the following cases: State v. Alston (94 Tenn. 674); State v. Henderson (160 Mo. 190); State v. Clark (30 Wash. 439); Hagerty v. State (55 Ohio, 613); Nunnemacher v. State (129 Wis. 190); *In re* McPherson (104 N. Y. 306); State v. Hamlin (86 Me. 495); Minot v. Winthrop (162 Mass. 113); Billings v. State (189 Ill. 472); State v. Dalrymple (70 Md. 294); Tyson v. State (28 Md. 577); Eyre v. Jacob (14 Gratt. 422); Gelsthorpe v. Furnell (20 Mont. 299); Wallace v. Myers (38 Fed. Rep. 184); Union Trust Co. v. Wayne Probate Judge (125 Mich. 487); Frothingham v. Shaw (175 Mass. 59); Appeal of Nettleton (56 Atl. Rep. 565); Estate of Magnes (32 Colo. 527); Pullen v. Commissioners of Wake Co. (66 N. C. 361); Estate of Campbell (143 Cal. 623); Thompson v. Kidder (N. H.) (65 Atl. Rep. 392).

The constitutionality of a law laying the tax according to a progressively increasing rate has been upheld in the following cases: Kochersperger v. Drake (167 Ill. 122); Nunnemacher v. State (129 Wis. 190); State *ex rel.* Foot v. Bazille (97 Minn. 11); State v. Clark (30 Wash. 439); Estate of Magnes (32 Colo. 527); Morris' Estate (138 N. C. 259); State v. Visonhaler (Nebr.) (105 N. W. Rep. 472).

The foregoing references are from a phamplet on inheritance tax laws issued by the United States Government (U. S. Govt. Printing Office, 1908).

[10] For a full discussion of the constitutionalty of inheritance tax laws, see Nunnemacher v. State (129 Wis. 190) decided in 1906.

[11] 170 U. S. 283. See also Billings v. Illinois (188 U. S. 97); Campbell v. California (200 U. S. 87).

It is established that, since the States have the power to curtail the power of disposition of property at death or the privilege of receiving by way of inheritance, they may, in the exercise of such power, make discriminations, in the matter of taxation, as to the exercise or enjoyment of such power or privilege: thus they may graduate the size of the tax upon the exercise of the power to dispose of property by will by the size of the legacy, and they may make exceptions;[12] they may discriminate between property which has not borne its full share of taxation during the testator's lifetime and that which has.[13] In Stebbins v. Riley[14] it was held that equal protection was not denied by a State tax law which provided that the market value of property transferred by will should be determined without deduction for any inheritance or estate tax paid to the United States. The court said: "There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation. The incidents which attach to each, as we have observed, may be made the basis of classification. We can perceive no reason why both may not be made the basis of classification in a single taxing statute so that the amount of tax which the legatee shall pay may be made to depend both on the total net amount of decedent's estate subject to the jurisdiction of the State and passing under its inheritance and testamentary laws and the amount of the legacy to which the legatee succeeds under those laws. Such a classification is not, on its face, unreasonable."

§ 897. Denial of Equal Protection by Reason of Mode of Administration.

A number of cases have come before the Supreme Court in which it has been charged by the complaining party that its property has been overvalued as compared with other properties, with the result that it has been unconstitutionally discriminated against. In Bohler v. Callaway[15] this complaint was found to be, in fact, justified. The court said: "It is well settled that if the administration of the tax laws of a State [as distinguished from their face provisions] is shown to result in an intentional and systematic discrimination against a complainant by a bill in a Federal court, the court may grant relief by injunction under the State law without deciding the Federal constitutional question upon which jurisdiction of the bill is based."[16]

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[12] Plummer v. Coler (178 U. S. 115).

[13] Watson v. State Comptroller (254 U. S. 122).

[14] 268 U. S. 137, 144, 145.

[15] 267 U. S. 479, 489.

[16] Citing Louisville & N. R. Co. v. Greene (244 U. S. 522); Greene v. Louisville and Interurban R. Co. (244 U. S. 499); Taylor v. Louisville & N. R. Co. (31 C. C. A. 537).

§ 898. Special Assessments.

The matter of special assessments in their relation to the equal protection of the laws has been dealt with in Chapter CII[17] of the author's larger work entitled *The Constitutional Law of the United States.*

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[17] For more recent cases dealing with special assessments, see Valley Farms Co. v. Westchester Co. (261 U. S. 155); Durham Public Service Co. v. Durham (261 U. S. 149); Milheim v. Moffat Tunnel Improvement District (262 U. S. 710); Butters v. Oakland (263 U. S. 162); Nampa and Meridian Irrigation District v. Bond (268 U. S. 50); Kansas City S. R. Co. v. Road Improvement District (266 U. S. 379).

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